American University Law Review

Volume 61 | Issue 1 Article 2

2011

Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron

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HEADS I WIN, TAILS YOU LOSE: RECONCILING *BROWN V. GARDNER*'S PRESUMPTION THAT INTERPRETIVE DOUBT BE RESOLVED IN VETERANS' FAVOR WITH *CHEVRON*

LINDA D. JELLUM*

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court held that agencies should determine the meaning of ambiguous statutes. But in the veterans law case* Brown v. Gardner*, the Supreme Court directed lower courts to resolve interpretive doubt in ambiguous statutes in favor of veterans. Which interpretation controls when a statute is ambiguous—the agency's reasonable interpretation or the veteran's interpretation? To date, none of the courts faced with this conflict have resolved this question clearly or definitively; indeed, the United States Court of Appeals for Veterans Claims recently asked the Supreme Court for guidance. To date, none has been forthcoming.*

In this article, I solve the conflict between Chevron*'s deference and* Gardner*'s veteran-friendly presumption. First,* Gardner*'s Presumption should revert to a liberal construction canon that requires courts to construe veterans' statutes liberally to further their remedial purposes, rather than in the veteran-litigant's*

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favor. The Presumption was originally a liberal construction canon before morphing into its present super-strong formulation. Second, courts should apply Gardner*'s Presumption in limited situations. Specifically, courts should apply* Gardner*'s Presumption only when the statute at issue addresses veterans' benefits and only when the VA has not already interpreted the statute in a way that entitles it to* Chevron *deference. Third, alternatively and most promisingly,* Gardner*'s Presumption could be viewed as a duty belonging to the VA rather than as an interpretive canon that courts apply. Regardless of which solution prevails, it is time to settle this conflict.*

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INTRODUCTION

In its landmark decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the United States Supreme Court altered the balance of interpretive power. Prior to *Chevron*, courts determined the meaning of ambiguous regulatory statutes; after *Chevron*, agencies determined the meaning of ambiguous regulatory statutes. While the effect of *Chevron* is much more nuanced than this simple truism, for the purposes of this Article, the statement is sufficient.

Yet, this truism does not hold true within veterans law. Within veterans law, there is a third player who has an interpretive role: the veteran. The veteran plays an interpretive role because of an unusual presumption identified by the Supreme Court in *Brown v. Gardner*.[2] Stated simply, *Gardner*'s Presumption[3] directs courts to resolve interpretive doubt in favor of the veteran.[4] *Gardner*'s Presumption has become a legend in veterans' jurisprudence, as veteran-litigants[5] and their counsel raise it often.[6] Additionally, the United States Court of Appeals for Veterans Claims ("Veterans Court") and the United States Court of Appeals for the Federal Circuit cite the Presumption frequently.[7] Even the Supreme Court occasionally refers to it.[8] Yet, *Gardner*'s Presumption conflicts directly with *Chevron*.[9]

In *Chevron*, the Supreme Court directed courts to defer to reasonable agency interpretations of ambiguous statutes pursuant to a two-step

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1. 467 U.S. 837 (1984). Although many commentators insert commas in the official cite, there are no commas in the petitioner's name in the official U.S. Reports. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* STRAUSS' ADMINISTRATIVE LAW STORIES 399 n.1 (Peter L. Strauss ed., 2006).

2. 513 U.S. 115 (1994).

3. This is my term, not the courts' term.

4. *Gardner*, 513 U.S. at 118.

5. While I use the terms "veteran" and "veteran-litigant" when speaking of someone seeking benefits from the Veterans Administration, the terms are meant to include veterans and their beneficiaries, who are also entitled to some benefits.

6. *See* Haas v. Peake, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (per curiam) (raising *Gardner*'s Presumption for the first time in a petition for rehearing); Sursely v. Peake, 22 Vet. App. 21, 23 (2007), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009); Smith v. Nicholson, 19 Vet. App. 63, 69 (2005), *rev'd*, 451 F.3d 1344 (Fed. Cir. 2006); Debeaord v. Principi, 18 Vet. App. 357, 362 (2004); Theiss v. Principi, 18 Vet. App. 204, 206 (2004); Jones v. Principi, 16 Vet. App. 219, 222–23 (2002) (noting for the first time that the issue was raised in a veteran's brief); *cf.* Osman v. Peake, 22 Vet. App. 252, 254 (2008) (raising the precursor to *Gardner*'s Presumption in an amicus brief).

7. *See, e.g.*, Nielson v. Shinseki, 607 F.3d 802, 808 (Fed. Cir. 2010); Carpenter v. Principi, 15 Vet. App. 64, 76 (2001).

8. *See, e.g.*, Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) (recognizing that the Court has "long applied [the canon]").

9. *Compare* Brown v. Gardner, 513 U.S. 115, 117–18 (1994) (stating that "interpretive doubt is to be resolved in the veteran's favor") *with* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (stating that a court cannot substitute its reading of a statute when an agency has reasonably interpreted the statute).

analysis.[10] Under *Chevron*'s first step, a court should determine "whether Congress has directly spoken to the precise question at issue."[11] If Congress has not so spoken, then, pursuant to *Chevron*'s second step, a court must accept any "permissible" or "reasonable" agency interpretation.[12] In contrast, *Gardner*'s Presumption directs that any statutory interpretive doubt—which the Veterans Court has equated with ambiguity—be resolved in a veteran's favor.[13] Therein lies the conflict: which interpretation controls when a statute is ambiguous, the agency's reasonable interpretation or the veteran's interpretation? To date, none of the courts faced with this conflict have resolved this question even though the Veterans Court recently called for the Supreme Court's guidance.[14]

In this Article, I answer that plea by exploring and resolving the conflict between *Chevron* and *Gardner*'s Presumption. In Part I of this Article, I briefly describe the history of the Veterans Court, the nonadversarial nature of the Department of Veterans Affairs' ("VA") administrative process, and the unique features of veterans law that explain why this Presumption developed and then morphed.[15] In Part II, I identify how *Gardner*'s Presumption started as a liberal construction canon and transformed into the veterans' trump card that it is today.[16] In Part III, I examine the role that *Gardner*'s Presumption has played in the Veterans Court, the Federal Circuit, and the Supreme Court.[17] Next, in Part IV, I explain the conflict between *Gardner*'s Presumption and *Chevron* and trace how the Veterans Court and the Federal Circuit have unsuccessfully attempted to resolve that conflict.[18] Finally, in Part V, I offer a number of ways to resolve the conflict.[19]

While this discussion is critically relevant to those involved in veterans law, it is also relevant to anyone applying *Chevron* and remedial-based statutory interpretation canons, such as the rule of lenity or the derogation canon. While *Chevron* directs that deference is owed to any reasonable

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10. *Chevron*, 467 U.S. at 843–44.
11. *Id.* at 843.
12. *Id.* at 843–44.
13. *Gardner*, 513 U.S. at 117–18. There was a similar presumption in tax jurisprudence that holds tax laws "are to be interpreted liberally in favor of the taxpayers." Bowers v. New York & Albany Lighterage Co., 273 U.S. 346, 350 (1927). The presumption has morphed with time. *See* Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, NEVADA LAWYER, April 2002, at 15 (exploring how the taxpayer presumption has changed due to broad social change).
14. Debeaord v. Principi, 18 Vet. App. 357, 368 (2004).
15. *See infra* Part I.
16. *See infra* Part II.
17. *See infra* Part III. To do so, I have read and evaluated every case from the Veterans Court, Federal Circuit, and Supreme Court through April 2011 in which *Gardner*'s Presumption was mentioned.
18. *See infra* Part IV.
19. *See infra* Part V.

agency interpretation of an ambiguous statute, remedial canons direct that broad interpretations should control when statutes are ambiguous. How should that conflict be resolved? This article answers that question in the context of veterans law.

I. VETERANS LAW: A NONADVERSARIAL SYSTEM

Understanding why *Gardner*'s Presumption developed and became so legendary within veterans law requires an understanding of the development of the Veterans Court.[20] Judicial review of VA decisions is relatively recent. Prior to 1988, VA benefit decisions were non-reviewable.[21] The VA acted in "splendid isolation."[22] Congress precluded review of such decisions, in part, due to the financial pressures of the Great Depression; essentially, Congress opted to save the government money and resources by denying review.[23] Not surprisingly, veterans disliked this system and fought for change.[24] In 1988, Congress created the Veterans Court, an Article I court, to provide judicial oversight of VA benefit decisions and to guarantee that those who risked their lives to defend America would have their day in court.[25] For the first time in history, veterans could seek review of adverse VA decisions.

The Veterans Court is unique. It has nine judges, whom the President appoints with the advice and consent of the Senate.[26] It is an appellate

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20. *See generally*, James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251 (2010) (explaining how the Veterans' Judicial Review Act moved the VA system from a charitable model to one of entitlement).

21. Act of March 20, 1933, ch. 3, § 5, 48 Stat. 9 (1933) ("All decisions rendered by the Administrator of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review . . . .").

22. Brown v. Gardner, 513 U.S. 115, 122 (1994) (quoting H.R. REP. NO. 100-963, pt. 1, at 10 (1988)) (internal quotation marks omitted). For detail regarding the development of the VA system and judicial review, see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VET. L. REV. 135 (2011); *see also* Ihor Gawdiak et al., Fed. Research Div., Library of Cong., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM (Mar. 1992).

23. *See* Scott H. Reisch, *211 In Progress: Must the Veterans' Administration Comply with Federal Law?*, 40 STAN. L. REV. 323, 323 & n.4 (1987). While most VA benefit decisions were non-reviewable, there were some exceptions. *See* Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding appellees could challenge the constitutionality of VA decisions); Barton F. Stichman, *The Impact of the Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 856–57 (1992) (noting that courts could hear challenges that VA regulations were arbitrary and capricious or violated statutory authority).

24. *See* Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162–65 (1992) (discussing veterans' dissatisfaction with the VA adjudication process prior to 1988).

25. *Id.*

26. Originally, only seven judges were to be appointed for fifteen-year terms. 38 U.S.C. § 7253(a), (c). Congress later added two positions on a temporary basis. 38 U.S.C.

court and, thus, it lacks authority to make factual determinations, except as to jurisdiction and prejudicial error.[27] Interestingly, the court can act either by three-judge panels or by a single judge.[28] The single-judge decision-making authority is unique to the Veterans Court and, while somewhat controversial, it may be a necessity.[29] The court has a crushing caseload: for example, in 2009, veterans filed 4,725 new cases with the court, which rendered 4,379 decisions.[30]

The veterans law system is distinctive in two important ways. First, "the VA [administrative] process is a nonadversarial one."[31] Congress specifically included a number of statutory advantages to veterans to ensure the nonadversarial and pro-claimant character of the administrative process.[32] For example, the VA must notify claimants of what they must do to establish an entitlement to benefits.[33] This notice must include "any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim."[34] Additionally,

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§ 7251(h).

27. 38 U.S.C. § 7261(c).

28. 38 U.S.C. § 7254(b).

29. *See, e.g.*, Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535 (2004) (discussing critics' simultaneous praise and condemnation of the court); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL'Y 279 (2004) (noting the overwhelming number of appeals heard by the court).

30. Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. Cinn. L. Rev. (forthcoming 2011) (citing *Annual Reports*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [hereinafter VETERANS COURT ANNUAL REPORTS]).

31. Robinette v. Brown, 8 Vet. App. 69, 75 (1995); *see* Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011) (recognizing that the VA's process for adjudicating a claim is non adversarial); *accord* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 323, 333–34 (1985) (stating that the system is designed to be "as informal and nonadversarial as possible"); Hodge v. West, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (concluding that because the system is "so uniquely pro-claimant," fairness is of great importance); Collaro v. West, 136 F.3d 1304, 1309–10 (Fed. Cir. 1998) (recognizing that the system is "nonadversarial, ex parte, [and] paternalistic").

32. *See* Allen, *Due Process and the American Veteran*, *supra* note 30 (noting that when a veteran receives a satisfactory decision from the Board of Veterans' Appeals, the process ends, but that a veteran who remains unsatisfied has an opportunity to appeal); Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 365–72 (2009) (same); Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 488 (2007) (explaining that Congress, in instituting the Veterans Court, provided for the first time "a meaningful and predictably available independent review of VA benefits decisions").

33. 38 U.S.C. § 5102(a).

34. *Id.* § 5103(a); *see also* 38 C.F.R. § 3.159(b)(1) (adopting regulations implementing the statutory duty to assist). Note the unusual nature of this obligation was recognized by one member of the Supreme Court. Shinseki v. Sanders, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) ("The VA differs from virtually every other agency in being itself

the VA Secretary cannot appeal a decision from the VA that favors the veteran.[35] However, once a veteran files a notice of appeal with the Veterans Court, the nonadversarial nature of the proceedings disappears.[36] Second, the veterans law system is distinctive in that the proportion of litigants filing a notice of appeal pro se is the highest of any federal appellate court in the country, averaging roughly seventy to eighty percent.[37] This high pro se rate developed, in part, because of the disincentives for lawyers to participate. For example, until 1988, lawyers could earn no more than ten dollars for assisting veterans with their claims.[38] Given that the veterans' system is nonadversarial, pro-claimant, and pro se, it might be expected that a presumption favoring veteran-friendly interpretations of ambiguous statutes would arise.

II. THE CREATION OF *GARDNER*'S PRESUMPTION

In a system that respects and values veterans to such a high degree, it should come as no surprise that *Gardner*'s Presumption, which directs courts to interpret ambiguous statutes in favor of veterans, would develop. However, *Gardner*'s Presumption began life in a less veteran-friendly form. This next section explores the development of *Gardner*'s Presumption from its humble beginnings as a liberal construction canon to its current formulation as a tie-breaking trump card.

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obligated to help the claimant develop his claim . . . ."); *see also* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 323, 333–34 (1985) (indicating that veterans are given safeguards including adequate representation, a duty on the part of the adjudicator to help the veteran, and "significant concessions with respect to the claimant's burden of proof").

35. 38 U.S.C. § 7252(a). However, any aggrieved party may appeal a Veterans Court decision to the Federal Circuit. 38 U.S.C. § 7292. The Federal Circuit has the power to review legal questions only; it cannot rule on factual determination or on the application of law to the facts in a particular case. 38 U.S.C. § 7292(d)(2).

36. The Veterans Court advises litigants that "[t]he Court's review of an appeal is an adversarial process and pro-veteran rules under which the VA decides claims do not apply to the Court." United States Court of Appeals for Veterans Claims, *Court Process*, *available at* http://www.uscourts.cavc.gov/about/how_to_appeal/HowtoAppealWithoutCourtProcess.cfm.

37. Bazalo v. Brown, 9 Vet. App. 304, 312 (1996) (Steinberg, J., concurring in part and dissenting in part), *rev'd sub nom.* Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998) (stating "about eighty percent"); VETERANS COURT ANNUAL REPORTS, *supra* note 30 (stating sixty-eight percent for 2009).

38. Act of July 4, 1864, §§ 12-13, 13 Stat. 387, 389. Before that, fees were limited to $5. Act of July 14, 1862, §§ 6-7, 12 Stat. 566, 568. *See Walters*, 468 U.S. at 1323 (addressing the $10 fee limit); Allen, *Due Process and the American Veteran*, *supra* note 30 (describing the fee limitation). Although most individuals filing notices of appeal at the Veterans Court are self-represented at the time of filing, they are not necessarily self-represented at the VA. The VA recognizes many service organizations that provide assistance to veterans pursuing a claim. The recognized service organizations can be found on the VA website: http://www.va.gov/vso/.

A. Gardner*'s Precursor:* Boone*'s Interpretive Canon*

Gardner's Presumption (or rather its precursor) made its first official appearance in 1943, in *Boone v. Lightner*.[39] In *Boone*, a serviceman in the military was sued to, among other things, "require him to account as trustee of a fund for his minor daughter."[40] Prior to the trial, the serviceman requested a continuance under the Soldiers' and Sailors' Civil Relief Act until after he completed his tour of duty.[41] The trial judge denied the request.[42] The serviceman lost the trial, and the court ordered him to pay $11,000.[43] Importantly, there was no agency interpretation at issue in this case[44]—just two private parties disputing the meaning of a statute.[45]

The serviceman appealed, arguing that the trial court should have granted his request for a continuance.[46] The Supreme Court disagreed, holding that there was sufficient evidence for the trial court to find that his military service did not prevent him from being able to attend the trial and prepare a defense to the suit.[47] However, at the conclusion of the Court's analysis, the Court noted, without citing any authority and without explaining the import of its statement, that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[48] The Court thereby created, or at least articulated for the first time, the interpretive canon that statutes benefitting military personnel should be liberally construed. This interpretive canon would become the foundation for *Gardner*'s Presumption—which directs that veterans statutes should be construed not just liberally, but in the veteran's favor.[49]

A few years after *Boone*, the Supreme Court again referenced, without further explanation, *Boone*'s interpretive canon in *Fishgold v. Sullivan*

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39. 319 U.S. 561, 575 (1943).
40. *Id.* at 561–62. He was trustee of a trust fund. *Id.* at 562.
41. *Id.* at 563.
42. *Id.* at 564.
43. *Id.*
44. Therefore, *Chevron* would not have applied even had it existed.
45. *Boone*, *319 U.S.* at 564–65. The Soldiers' and Sailors' Civil Relief Act provided:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service . . . may, in the discretion of the court in which it is pending . . . be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, art. II, § 201, 54 Stat. 1178, 1181 (1940).
46. *Boone*, 319 U.S. at 564.
47. *Id.* at 572.
48. *Id.* at 575. Or, as Justice Douglas noted in a later case, "the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call." Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).
49. Brown v. Gardner, 513 U.S. 115, 117–18 (1994).

Drydock & Repair Corp.[50] In *Fishgold*, the Court had to determine whether a veteran who returned to his former job as a welder could be laid off during slow work periods or whether such a layoff would violate the Selective Training and Service Act of 1940.[51] As in *Boone*, there was no agency interpretation at issue in this case, but rather two private parties disputing the meaning of a statute.[52] The Supreme Court adopted the employer's interpretation, allowing the employer to lay off the employee due to slowed working conditions.[53] In its analysis, the Court stated simply, "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[54] The Court cited *Boone* but failed to elaborate or explain the interpretive canon.[55] Also, as it had in *Boone*, the Court did not interpret the statute in the veteran's favor despite the direction to construe such statutes liberally.[56]

Those familiar with statutory interpretation have likely already noted the similarity of *Boone*'s interpretive canon with an oft-repeated canon of interpretation that instructs that remedial statutes should be construed liberally to further their "remedial" purposes.[57] *Boone*'s interpretive canon is similar, if not identical, to the remedial interpretation canon, likely because veterans' benefits statutes are remedial.[58] Remedial statutes

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50. 328 U.S. 275, 285 (1946).

51. *Id.* at 280.

52. *Id.* at 279–80 (describing private parties' involvement in the dispute). The statute at issue provided:

> In the case of any [military personnel] who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer . . . such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . . .

Id. at 278 n.1 (quoting Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. Appendix, § 301 et seq.).

53. *Fishgold*, 328 U.S. at 288.

54. *Id.* at 285 (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

55. *See id.* at 285 (asserting that legislation addressing honorable discharge of veterans is to be liberally construed in favor of veterans without addressing the foundation for this assertion).

56. *See id.* at 288 (finding no support for the petitioner's assertion that he should be restored to his former position).

57. Chisom v. Roemer, 501 U.S. 380, 403–04 (1991); Smith v. Brown, 35 F.3d 1516, 1525 (Fed. Cir. 1994), *superseded by statute*, 38 U.S.C. § 7111 (1997), *as recognized in* Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005). For example, in *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687 (1995), the majority construed the word "take" broadly because the majority characterized the statute at issue to be "remedial." *Id.* at 704–08. In contrast, writing for the dissent, Justice Scalia refused to interpret the word broadly because the statute impacted property rights and was, therefore, in derogation of common law. *Id.* at 717–18 (Scalia, J., dissenting); *see also* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977) (reasoning that the broad language of the remedial statute indicates that the Court should take an expansive view of its coverage; Voris v. Eikel, 346 U.S. 328, 333 (1953) (announcing that the statute should be liberally interpreted to achieve its intent and avoid unfair results).

58. *See Smith*, 35 F.3d at 1525–26 (stating that veterans' benefits statutes "clearly fall"

correct (or remedy) existing statutes, create new rights, or expand remedies that were otherwise unavailable at common law.[59] Hence, the Court's development of and lack of explanation for *Boone*'s interpretive canon is, perhaps, unsurprising. Yet, in neither *Boone* nor *Fishgold* did the Court mention the remedial canon as its basis for creating *Boone*'s interpretive canon. It is therefore unclear whether the Court believed that liberal interpretation was appropriate simply because veterans' benefits statutes are remedial in nature or for some other, unstated reason. In later cases, the Court identified two reasons for liberally construing veterans' benefits statutes: first, to express the nation's gratitude for veterans' sacrifice; and second, to help veterans overcome the adverse effects of service and reenter society more readily.[60] Thus, liberally construing veterans' benefits statutes furthers important policies—expressing gratitude and helping veterans. Moreover, interpreting veterans' benefits statutes liberally to achieve these purposes seems appropriate and consistent with the remedial canon and the veteran-friendly nature of veterans law.

B. Boone*'s Morph*

While *Boone*'s interpretive canon simply directed courts to construe veterans' benefits statutes liberally, the Court transformed it from a liberal construction canon to a trump card that veterans could assert to defeat reasonable agency interpretations. This section will explain how this transformation occurred.

The Supreme Court began its transformation of *Boone*'s interpretive canon in *King v. Saint Vincent's Hospital*.[61] In that case, the Court had to determine whether a provision in the Veterans Reemployment Rights Act provided a member of the reserve services with an unlimited right to

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in the remedial category); White v. Unites States, 102 F. Supp. 585, 586 (Ct. Cl. 1952) (citing *Fishgold*, 328 U.S. at 275; *Boone*, 319 U.S. at 561) ("As remedial legislation [the veterans statutes at issue] are to be liberally construed.").

59. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 251 (2008). *But see* Ober United Travel Agency, Inc. v. U.S. Dep't of Labor, 135 F.3d 822, 825 (D.C. Cir. 1998) (stating "it is not at all apparent just what is and what is not remedial legislation; indeed all legislation might be thought remedial in some sense—even massive codifications.").

60. Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 626 & n.3 (1985) (Stevens, J., dissenting). In *Hooper*, Justice Stevens noted that "[the] simple interest [of] expressing . . . gratitude" for sacrifices veterans have made is "adequate justification" and further, "the fact that military service typically disrupts the normal progress of civilian employment justifies additional tangible benefits . . . to facilitate the reentry into civilian society. A policy of providing special benefits for veterans' past contributions has 'always been deemed to be legitimate.'" *Id.* (quoting *Boone*, 319 U.S. at 575); *see also* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550–52 (1983) ("Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.").

61. 502 U.S. 215 (1991).

civilian reemployment.[62] The reservist's employer refused the reservist's request for a three-year leave of absence, claiming the length of time was unreasonable.[63] As was true in *Boone* and *Fishgold*, this lawsuit did not involve an agency's interpretation of a statute.[64] Rather, the reservist's employer sought a declaratory judgment that the statute should be read to include a reasonable limit on the length of time that the reservist's position had to be kept open.[65] Hence, here again two private parties disputed a statute's meaning.[66] Rejecting the employer's interpretation,[67] the Supreme Court found the text of the statute clear and free of any express limitation.[68]

The Court could and should have ended its analysis there; it did not. Instead, in a footnote, the Court suggested in dictum that even if the employer had had a reasonable argument that the statute was ambiguous, the Court would have resolved any ambiguity in favor of the reservist.[69] The Court cited *Fishgold* for support for its assertion and noted that Congress was likely aware of this interpretive principle when it drafted the statute.[70] But *Fishgold* did not support the Court's assertion. In *Fishgold* (and *Boone*), the Court said only that veterans' benefits statutes should be liberally construed to further the dual purposes of expressing gratitude and of helping veterans assimilate back into civilian life.[71]

In contrast, in *King*, the Court changed *Boone*'s interpretive canon from a liberal construction canon into a command that courts construe such

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62. *Id.* at 216.
63. *Id.* at 217.
64. *Id.*
65. *Id.* at 219.
66. The Act provided:

> [Any covered person] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such . . . [duty] . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

Id. at 218 (quoting 38 U.S.C. § 2024(d)(1988)).

67. The employer argued that the language in the statute—for the period required to perform active duty for training or inactive duty training—should be read to include a reasonableness limitation to protect employers generally from the burdens of holding jobs open indefinitely. *Id.* at 218. Lower courts agreed. The United States Court of Appeals for the Third, Fifth, and Eleventh Circuits had engrafted a reasonableness requirement, while the Fourth Circuit declined to do so. *Id.*

68. *Id.* at 222. While the Court recognized the employer's concerns, it did not feel comfortable "tinker[ing] with the statutory scheme [by] accord[ing] some significance to the burdens imposed on both employers and workers when long leaves of absence are the chosen means of guaranteeing eventual reemployment to military personnel." *Id.* at 220.

69. *Id.* at 220–21 n.9 ("[The Court] would ultimately read the provision in [the reservist's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

70. *Id.*

71. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 288 (1946); Boone v. Lightner, 319 U.S. 561, 575 (1943).

statutes "in the [veterans'] favor."[72] Construing a statute liberally and construing a statute in a veteran's favor are not identical; a statute can be liberally construed and still not favor the veteran, as the outcomes in both *Boone* and *Fishgold* demonstrated.[73] *Boone*'s morph into a super-strong presumption thus started as dictum in this footnote from *King*.

Had the Court simply created and then transformed *Boone*'s interpretive canon and stopped, applying it only to cases involving private litigants, there would be little to discuss in this Article. Yet, with time, the Court expanded the application of this interpretive canon from those cases involving private litigants arguing over how to interpret a statute to all cases involving veterans and questions of statutory interpretation.[74] Up and until the time *King* was decided, *Boone*'s interpretive canon had been applied only in cases involving individual litigants arguing about the interpretation of a statute.[75] No agency interpretations were involved because VA benefit decisions were not yet reviewable.[76] Thus, from the time the Supreme Court created *Boone*'s interpretive canon in 1943 until the time that Congress created the Veterans Court in 1988, no court applied the canon in a case in which a veteran and the VA disputed the interpretation of a statute. With the arrival of *Chevron* deference in 1984 and the creation of judicial review of VA decisions in 1988, the landscape changed.

C. Chevron *Deference*

In *Chevron*, the Supreme Court developed its famous, two-step framework for courts to use when evaluating an agency's interpretation of a statute.[77] The facts of the case are well-known and need not be repeated here.[78] The issue for the Court was whether the Environmental Protection

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72. *King*, 502 U.S. at 221 n.9.

73. *Fishgold*, 328 U.S. at 285 (deciding against the veteran, but still applying *Boone* to state that legislation should be liberally construed for military personnel); *Boone*, 319 U.S. at 575 (finding against the veteran, but for the first time noting that statutes benefitting persons in the military should be liberally construed).

74. Brown v. Gardner, 513 U.S. 115, 118–20 (1994).

75. *See, e.g.*, *Fishgold*, 328 U.S. 275 (rejecting an honorably discharged veteran's claim under the Selective Service Act).

76. *See supra* note 21 and accompanying text.

77. 467 U.S. 837, 842 (1984).

78. *Chevron* involved a question about the Clean Air Act. *Id.* The provision of the Act at issue required permits when a plant wished to modify or build a "stationary source" of pollution. *Id.* at 840. "Stationary source" was not defined in the act. *Id.* at 841. Thus, the Environmental Protection Agency, the agency in charge of administering the Act, had to interpret the term. *Id.* at 843. It issued two notice and comment regulations interpreting "stationary source." *Id.* The first regulation defined "stationary source" as the construction or installation of any new or modified equipment that emitted air pollutants. *Id.* at 840 n.2. But the following year, the EPA repealed that regulation and issued a new one that expanded the definition to encompass a plant-wide or "bubble concept" definition. *Id.* at 858. The bubble concept interpretation allowed a plant to offset increased air pollutant

Agency's interpretation of specific language in the Clean Air Act was valid.[79] The Court upheld the agency's interpretation, creating the two-step deference framework.[80] Under the first step, a court should determine "whether Congress has directly spoken to the precise question at issue."[81] When applying this first step, courts should not defer to agencies.[82] Rather, "[t]he judiciary is the final authority on issues of statutory construction . . . ."[83] Assuming Congress was unclear, then, pursuant to step two, a court must accept any "reasonable" agency interpretation, even if the court believes a different policy choice would be better.[84] *Chevron*'s two-step analysis was an entirely new deference standard from the existing standard, one very deferential to agencies.

The Court justified increasing the level of deference given to agencies for three reasons. First, the Court reasoned that agency personnel are experts in their fields, whereas judges are not.[85] Congress entrusts agencies to implement law in a particular area because of this expertise.[86] Scientists and analysts working for the Food and Drug Administration, for example, are more knowledgeable about food safety and drug effectiveness than are judges. Because agency personnel are specialists in their field, they are in a better position to implement effective public policy.[87] The Court believed that judges were more limited in both their knowledge of complex topics and their method for gathering such information.[88] While agencies can develop policy using a wide array of methods, courts are limited to the adversarial process.[89] Therefore, deferring to the experts made sense to the Supreme Court.[90] Second, Congress simply cannot legislate every detail of

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emissions at one part of its plant so long as it reduced emissions at another part of the plant. Under the new interpretation, as long as total emissions at the plant remained constant, no permit was required. *Id.* at 852. Not surprisingly, environmentalists sued.

79. *Id.* at 852.

80. *Id.* at 842.

81. *Id.* In other words, is Congress's intent clear—however clarity may be discerned—or is there a gap or ambiguity to be resolved? According to the Court, clarity was to be determined by "employing traditional tools of statutory construction." *Id.* at 843 n.9.

82. *Id.* at 842–43.

83. *Id.* at 843 n.9.

84. *Id.* at 843–44. Deference to the agency under *Chevron*'s second step is much higher. Indeed, if a litigant challenges an agency interpretation and loses at step one—meaning the court finds ambiguity— that litigant will likely lose the case. According to one empirical study from 1995–1996, agencies prevail at step one forty-two percent of the time and at step two eighty-nine percent of the time. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998).

85. *Chevron*, 467 U.S. at 865.

86. *Id.*

87. *Id.*

88. *Id.* at 865.

89. *Id.*

90. *Id.* at 866.

a comprehensive regulatory scheme.[91] Gaps and ambiguities are inevitable; when Congress delegates responsibility for the regulatory area to an agency, that agency must fill and resolve these gaps and ambiguities.[92] In *Chevron*, the Court presumed that when Congress leaves gaps and ambiguities, it impliedly delegates to the agency the authority to resolve them.[93] Finally, administrative officials, unlike federal judges, have a political constituency to which they are accountable and thus, the Court reasoned, federal judges "have a duty to respect legitimate policy choices made by [administrative officials]."[94]

After *Chevron*, deference became an "all-or-nothing grant of power from Congress."[95] Either Congress was clear when it drafted the statute and no deference would be due to the agency's interpretation, or Congress was unclear when it drafted the statute and complete deference would be due to the agency's *reasonable* interpretation.[96] If this two-step deference standard applies, then there is simply no place for *King*'s "tie goes to the Veteran" presumption.

D. Gardner*'s Presumption*

Ten years after deciding *Chevron*, the Supreme Court referred to its *King* dictum in *Brown v. Gardner*, a case that made "*Gardner*'s Presumption" common parlance in veterans law.[97] For the first time, the Court used *Boone*'s interpretive canon (as reformulated in *King*) in a case involving a challenge to an agency's—in this case, the VA's—interpretation of a statute.[98] Yet, the Court seemed oblivious to the conflict between its direction in this case and its direction in *Chevron*.

Gardner's facts are simple. Brown, a veteran, had back surgery in a VA facility for a medical condition unrelated to his military service.[99] After the surgery, he developed pain and weakness in one leg; he sought disability benefits under 38 U.S.C. § 1151, which provided compensation for "'an injury or an aggravation of an injury' that occurs 'as the result of hospitalization, medical or surgical treatment'" not attributable to the veteran's "willful misconduct."[100] The VA had issued a regulation interpreting this statute to cover an injury only if it arose from fault or

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91. *Id.* at 843–44.
92. *Id.* at 843.
93. *Id.*
94. *Id.* at 866.
95. Linda D. Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 739 (2007) [hereinafter *Chevron*'s Demise].
96. *Id.*
97. 513 U.S. 115 (1994).
98. *Id.* at 117–18.
99. *Id.* at 116.
100. *Id.* (quoting 38 U.S.C. § 1151 (1994)).

accident on the part of the VA.[101] Pursuant to this regulation, the VA denied Brown's claim, stating that the statute, as interpreted by the regulation, required "fault-or-accident."[102] The Veterans Court reversed, finding that the statute did not contain such a requirement.[103] The Federal Circuit affirmed.[104]

The Supreme Court also affirmed, holding that the regulation was inconsistent with the plain language of the statute.[105] While the Court should have applied *Chevron*'s two steps to analyze whether to defer to the VA's interpretation in its regulation, the Court did not do so explicitly.[106] Rather, the Court simply looked to the text of the statute, found the language clear and found that language inconsistent with the VA's regulation.[107] Essentially, the Court applied *Chevron*'s first step and stopped, but the Court certainly did not explain that it was applying *Chevron*.[108]

After finding the language clear, the Court stated in dictum that even if the government could show ambiguity—which the government could not—any "interpretive doubt [was] to be resolved in the veteran's favor."[109] In so doing, the Court cited the footnote dictum from *King*.[110] The Court thus transformed *Boone*'s interpretive canon from a directive to courts to interpret veterans' benefits statutes liberally into a directive to courts to resolve any interpretive doubt in the veteran-litigant's favor—even in the face of a contrary agency interpretation.[111] In essence, with its dicta in both *King* and *Gardner*, the Court created a "tie-to-the-veteran" presumption with little explanation or awareness of the potential conflict with *Chevron*.

Importantly, *Boone*, *Fishgold*, and *King* did not involve an agency interpretation of a statute.[112] Also, none of the subsequent Supreme Court cases in which the majority cited either *Boone* or *Fishgold* involved VA

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101. *Id.* at 117 (quoting 38 C.F.R. § 3.358(c)(3) (1993)).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 118–20.
106. Indeed, the first time the Court cites *Chevron* is toward the end of the opinion, when the Court quotes another case, *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993), which quotes *Chevron*. *Id.* at 120. Only in the very last paragraph does the Court cite *Chevron* for justification for the Court's refusal to defer. *Id.* at 122.
107. *See id.* at 117–20 (dismissing the VA's claim that "injury" includes a fault requirement).
108. *Id.*
109. *Id.* at 118.
110. *Id.*
111. *See id.* at 117–18.
112. *See* King v. St. Vincent's Hosp., 502 U.S. 215, 217 (1991) (analyzing a hospital's interpretation of a statute); Fishgold v. Sullivan Drydock & Repair Corp, 328 U.S. 275, 279 (1946) (analyzing an arbitrator's interpretation of a statute); Boone v. Lightner, 319 U.S. 561 (1943) (analyzing a trial court's interpretation of a statute).

interpretations of statutes.[113] Rather, all involved situations in which the veteran[114] sued or was sued by a private individual or entity[115] or by a city or state government.[116] Perhaps in these situations, *Gardner*'s Presumption was appropriate.[117] However, when a federal agency like the VA interprets a statute, *Chevron* should come into play. The Supreme Court failed to recognize this conflict in *Gardner*, and for many years the lower courts similarly failed to notice it.

While it is not exactly clear why the Supreme Court modified *Gardner*'s Presumption from its liberal construction beginnings to its super-strong formulation, the history of judicial review in this area offers a potential explanation. When the Court decided *Gardner* in 1994, judicial review of VA decisions was only six years old.[118] Possibly, the Court developed *Gardner*'s Presumption to help ease the transition to judicial review and to help maintain the pro-claimant nature of veterans law. The Presumption might have served as a transitional doctrine; it was easy to apply and favored veterans. It gave both the VA and the Veterans Court an easy default. However, to the extent that the Presumption was ever to have super-strength, the time has now passed as the VA has been subject to judicial review for nearly twenty-five years.[119] Moreover, as this Article discusses below, *Gardner*'s Presumption has morphed well beyond this possible purpose.

III. *GARDNER*'S PRESUMPTION IN THE COURTS

For a pro-claimant, young judicial system, *Gardner*'s Presumption likely appeared as an easy, bright-line, veteran-friendly interpretive rule. Thus, shortly after the Supreme Court decided *Gardner*, the Veterans Court and Federal Circuit cited the Presumption relatively regularly, although they

113. *See supra* notes 102–104.

114. *But see* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 542, 550–51 (1983) (discussing that nonprofit organization not representing veterans sought declaratory judgment that it qualified for tax exempt status after its application was denied by Internal Revenue Service).

115. *See, e.g.*, *King*, 502 U.S. at 215 (dealing with a declaratory judgment brought by a private employer to determine whether employer had to hold open job for military employee who was to be stationed for three years); Ala. Power Co. v. Davis, 431 U.S. 581, 582 (1977) (involving suit between veteran and private employer to obtain credit with respect to pension plan for the time veteran spent in the military); Le Maistre v. Leffers, 333 U.S. 1, 3 (1948) (involving suit between veteran and new land owner to set aside tax deed).

116. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 514 (1993) (involving suit of Army officer on active duty against town and property's purchasers to quiet title); Dameron v. Brodhead, 345 U.S. 322, 323 (1953) (involving suit between Army officer and City and County of Denver).

117. *See infra* Part V.B.

118. *See* Helfer, *supra* note 24, at 162–65 (discussing the creation of the Veterans' Court in 1988, which allowed for VA decisions to be reviewed).

119. *Id.*

did not seem to know exactly what to do with it. This next section explores how the Veterans Court and the Federal Circuit used *Gardner*'s Presumption until they recognized that it conflicted with *Chevron*.

A. The Veterans Court's Use of Gardner*'s Presumption*

While *Gardner*'s Presumption quickly became a legend in veterans jurisprudence, the Veterans Court used it inconsistently. The court occasionally used the Presumption as the primary support for its holdings.[120] More habitually, the court used the Presumption as supplemental support for its holdings,[121] simply noting the Presumption in passing.[122] Finally, the court often failed to mention the Presumption at all when the court's holding supported the VA's position rather than the veteran's position.[123] Some examples of each of these uses follow.

1. Gardner*'s Presumption as primary support*

While rare, the Veterans Court has used *Gardner*'s Presumption as primary support for its holding; yet, the court commonly cites the Presumption with little analysis or explanation. For example, in *Carpenter v. Principi*,[124] the issue for the court was whether an attorney could recover both a thirty percent contingency fee and an Equal Access to Justice Act ("EAJA") award for work on the same case.[125] The EAJA allows litigants, including veterans, to receive attorneys' fees and expenses when they prevail in litigation against the government so long as they meet certain requirements.[126] The VA had held that this dual award was "excessive and

120. *See, e.g.*, Carpenter v. Principi, 15 Vet. App. 64, 76 (2001) (holding that an attorney could not recover contingency fees and Equal Access to Justice Fees for one case).

121. *See, e.g.*, Nielson v. Shinseki, 23 Vet. App. 56, 59 (2009) (using *Gardner*'s Presumption as supplemental support), *aff'd* 607 F.3d 802 (Fed. Cir. 2010); Osman v. Peake, 22 Vet. App. 252, 259 (2008) (indicating that even if the issue were a "close one," the court was required to resolve any interpretive doubt "in the veteran's favor" (citing Brown v. Gardner, 513 U.S. 115, 120 (1994))); Otero-Castro v. Principi, 16 Vet. App. 375, 380 (2002) (applying *Gardner*'s Presumption to resolve ambiguity in favor of veteran); McCormick v. Gober, 14 Vet. App. 39, 47 (2000) (citing *Gardner*'s Presumption to support court's holding that Secretary had authority to interpret 38 U.S.C. § 5107(a) to assist veterans in making a well-grounded claim).

122. *E.g.*, Jackson v. Shinseki, 23 Vet. App. 27, 34 (2009) (noting the presumption, but not discussing it); Hartness v. Nicholson, 20 Vet. App. 216, 221 (2006) (noting only that the court was "mindful that any ambiguity in interpretation must be resolved in the veteran's favor"); *accord* Nielson v. Shinseki, 23 Vet. App. 56, 59 (2009), *aff'd* 607 F.3d 802, 808 (Fed. Cir. 2010); Abbey v. Principi, 17 Vet. App. 282, 290 (2003).

123. *See, e.g.*, Theiss v. Principi, 18 Vet. App. 204, 206 (2004) (failing to mention the presumption other than to note that the veteran mentioned it); Gomez v. Principi, 17 Vet. App. 369, 375 (2003) (ignoring *Gardner*'s Presumption altogether, although the concurrence did refer to it).

124. 15 Vet. App. 64 (2001).

125. *Id.* at 69.

126. Applicants must meet the following requirements: (1) show that they were the prevailing party; (2) show that they are financially eligible for the award; (3) allege that the

unreasonable."[127]

At issue for the Veterans Court was whether the legal work the attorney performed before the court and the legal work the attorney subsequently performed after the veteran's case was remanded to the VA were "the same work."[128] If they were the same work, then the double award was impermissible because the court "would improperly be allowing the EAJA fee to enhance the [attorney's] fee, rather than to reimburse the veteran for the cost of representation."[129]

Without first finding the language in the statute to be ambiguous and without offering any explanation as to why *Gardner*'s Presumption applied when the EAJA is a generally applicable statute and not a veterans benefit statute, the court cited *Gardner*'s Presumption simply to support its holding that whenever an attorney represents a client in a claim, all work on that claim should be considered the same work.[130] The court reasoned only that "[i]f there is any room for interpretive doubt as to what constitutes the 'same work' for the purposes of EAJA, such doubt must be resolved in the veterans' favor."[131] The court offered no further analysis.

The dissents criticized the majority's lack of analysis. Chief Judge Kramer noted that "the majority . . . fails to provide adequate analysis and legal support for its holding . . . ."[132] Judge Steinberg lamented, "[t]he opinion's principal stated justification for the interpretive leap of equating 'same work' with 'same claim' seems to be a citation to *Brown v. Gardner* . . . ."[133] In addition, Judge Steinberg questioned whether *Gardner*'s Presumption had any applicability when there was no interpretive doubt or ambiguity.[134] In short, the dissents noted that *Gardner*'s Presumption provided no support for the majority's holding.[135] The majority offered no response to these criticisms. Notably, *Chevron* was not an issue in this case.

Similarly, the Veterans Court used *Gardner*'s Presumption as primary support in two other cases in which *Chevron* did not apply. In the first

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government's position was not substantially justified; and (4) provide an itemized statement of the fees sought. Bazalo v. Brown, 9 Vet. App. 304, 308, *rev'd sub nom.* Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998) (citing Lematta v. Brown, 8 Vet. App. 504 (1996)).

127. *Carpenter*, 15 Vet. App. at 66.

128. *Id.* at 72. (citing Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 2412 (2000)).

129. *Id.* at 76.

130. *Carpenter*, 15 Vet. App. at 76.

131. *Id.* at 76 (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)). The interpretation was veteran-friendly because the overpayment was returned to the veteran. *Id.* at 66.

132. *Id.* at 94 (Kramer, C.J., dissenting).

133. *Id.* at 90 (Steinberg, J., concurring in part and dissenting in part).

134. *Id.*

135. *See supra* notes 132–134 and accompanying text.

case, *Otero-Castro v. Principi*,[136] the court reviewed the VA's denial of a veteran's request for an increased disability rating for his service-connected heart disease.[137] The facts are more complicated than merit discussion here. In short, the court found the applicable regulation ambiguous, rejected the VA's interpretation, and adopted the veteran's interpretation solely because "interpretive doubt is to be resolved in favor of the claimant . . . ."[138] Because the VA had interpreted its own regulation in this case, rather than a statute, *Chevron* did not apply.[139] The court assumed, but did not explain, that *Gardner*'s Presumption, which applies to interpretations of ambiguous *statutes*, should also apply to interpretations of ambiguous *regulations*.[140] While there is good reason to believe that *Gardner*'s Presumption should not apply in cases evaluating the VA's interpretation of its regulations,[141] the court cited *Gardner*'s Presumption as the primary support for its holding.[142]

In the second case, *Cottle v. Principi*,[143] the issue was whether a veteran who had been injured while working as an employee of the Dallas transit system while receiving VA rehabilitation employment services was injured in "*the pursuit of a course of vocational rehabilitation . . . .*"[144] Neither the statute nor the implementing regulations defined the italicized phrase.[145] Moreover, the legislative history was similarly not illuminating.[146]

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136. 16 Vet. App. 375 (2002).
137. *Id.* at 376.
138. *Id.* at 382 (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)).
139. Traditionally, courts defer almost completely to an agency's interpretation of its own regulation because the agency wrote the regulation. *See generally* JELLUM, MASTERING STATUTORY INTERPRETATION, *supra* note 59 at 227–29 (explaining that agencies have the experience and flexibility necessary to properly interpret their own regulations). In 1945, the Supreme Court held that an agency's interpretation of its regulation would have "controlling weight unless it [was] plainly erroneous." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). This high level of deference should come as no surprise since it was the agency that drafted the regulation in the first place. The Court reasoned that when Congress delegates the authority to promulgate regulations, it also delegates the authority to interpret those regulations. *Id.* Such power is a necessary corollary to the former. This substantial level of deference is generally known as either *Seminole Rock* or *Auer* deference. The latter term refers to the Supreme Court case of *Auer v. Robbins*, 519 U.S. 452 (1997), which followed *Chevron* and confirmed that *Seminole Rock* deference had survived *Chevron*. *Auer*, 519 U.S. at 461–63.
140. *Otero-Castro*, 16 Vet. App. at 382.
141. If an agency's interpretation of its regulation must be "plainly wrong" before the court can reject that interpretation, there can be little place for *Gardner*'s Presumption; the VA's interpretation would have to be plainly wrong before it was rejected. Thus, *Gardner*'s Presumption not only conflicts with *Chevron* deference, it also conflicts with *Auer* deference. Yet, in *Otero-Castro*, the Veterans Court rejected the VA's interpretation without mentioning or even citing *Auer*. *Id.*
142. *Id.*
143. 14 Vet. App. 329 (2001).
144. *Id.* at 332 (quoting 38 U.S.C. § 1151 (1994)).
145. *Id.* at 332–34 (citing 38 U.S.C. §§ 1151, 3101 & 38 C.F.R. §§ 21.210, 21.268, 21.283 (2000)).
146. *Id.* at 334.

Chevron deference was not appropriate in this case because the only VA interpretation of the statue at issue was made in a Precedent Opinion issued by the VA General Counsel.[147] *Chevron* is not appropriate when agencies interpret statutes in this manner.[148] The general counsel memorandum concluded that a "participant who is *receiving* only a period of employment services while engaged in post-training employment is not *pursuing* 'a course of vocational rehabilitation' within the meaning of [the statute] so as to qualify for disability compensation benefits under that section."[149] While acknowledging that interpretations contained within VA regulations would be entitled to deference, the court correctly noted that it owed no deference to "an opinion prepared exclusively for adjudication or litigation of a particular claim . . . ."[150] The court then rejected the VA's interpretation, citing *Gardner*'s Presumption.[151] The court was blunt: although the general counsel had acknowledged that the statute could be read broadly to cover the veteran's injury, she chose to interpret the statute narrowly.[152] The court rejected her choice and chastised her for "fail[ing] to discuss or consider *Gardner* at all."[153]

Importantly, in this case the Veterans Court expanded the application of *Gardner*'s Presumption beyond the courtroom. Specifically, the court stressed that *Gardner*'s Presumption required not only courts but also the VA to "resolv[e] any interpretative doubt in favor of the veteran . . . ."[154] For the first time, the court suggested that *Gardner*'s Presumption placed an affirmative duty on the VA, in addition to or perhaps instead of the court, to resolve interpretive doubt in favor of the veteran before a case was even litigated.[155] While intriguing, this expansion of *Gardner*'s Presumption has yet to reappear in the court's jurisprudence; yet, as I will explain below, this approach to *Gardner*'s Presumption resolves the conflict and balances the competing interests.[156]

Despite these three cases, the Veterans Court rarely uses *Gardner*'s Presumption as the primary support for its holdings. More commonly, the court refers to the Presumption merely as additional, or back-up, support.

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147. *Id.* at 331.
148. For a discussion of when *Chevron* applies and when it does not, *see generally*, JELLUM, MASTERING STATUTORY INTERPRETATION, *supra* note 59, at 225–26.
149. *Cottle*, 14 Vet. App. at 331 (quoting VA Gen Coun. Prec. 14-97 (Apr. 7, 1997)).
150. *Id.* at 335.
151. *Id.*
152. *Id.* at 336.
153. *Id.*
154. *Id.*
155. *See id.* (tasking the VA General Counsel to "discuss or consider *Gardner*" prior to litigation).
156. *See infra* Part V.

2. Gardner*'s Presumption as supplemental support*

The Veterans Court used *Gardner*'s Presumption as supplemental support for its holding favoring the veteran-litigants in a number of cases. For example, in *Allen v. Brown*,[157] the court had to determine whether the VA properly denied benefits to a veteran who claimed that a service-related injury to his right knee had aggravated non-service-connected injuries in his left knee and hips.[158] The issue for the court was whether the term "disability" in 38 U.S.C. § 1110 included non-service-related injuries aggravated by service-related injuries.[159] The statute provided that veterans would receive compensation for "*disability* resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty . . . ."[160] Additionally, a VA regulation interpreting this statute provided: "*[d]isability* which is proximately due to or the result of a service-connected disease or injury shall be service connected."[161] Because "disability" was not clearly defined in either the statute or the regulation to include or to exclude aggravation of non-service-related injuries, the court correctly interpreted the statute without giving any deference to the agency's regulation.

Instead, the court turned to its holding in an earlier case, *Hunt v. Derwinski*,[162] in which the court found the VA's interpretation of the term "disability" for another statute to be reasonable.[163] The court adopted the same interpretation of "disability" for both statutes.[164] Notably, the court's reasoning did not automatically flow from the *Hunt* holding.[165] Thus, to further support its interpretation, the court cited *Gardner*'s Presumption.[166] Without discussion, the court simply noted that "resolving doubt between

157. 7 Vet. App. 439 (1995).
158. *Id.* at 440.
159. The Veterans Court had actually interpreted the statute to deny coverage for aggravated injuries in an earlier case, *Leopoldo v. Brown*, 4 Vet. App. 216, 218–19 (1993), but that opinion directly contradicted the holding in an earlier case decided by the Veterans Court, *Tobin v. Derwinski*, 2 Vet App. 34 (1991), in which the court had held that aggravated injuries were covered. *Id.* at 39. To resolve the conflicting case law, the Court decided the *Allen* case *en banc*. *Allen*, 7 Vet. App. at 445–46.
160. *Id.* at 446 (quoting 38 U.S.C. § 1110 (2000)).
161. *Id.* at 446 (quoting 38 C.F.R. § 3.310(a) (1994)).
162. 1 Vet. App. 292 (1991).
163. *Allen*, 7 Vet. App. at 447 (citing Hunt v. Derwinski, 1 Vet. App. 292 (1991) (interpreting 38 U.S.C. § 1153)).
164. *Id*. at 448 (citing *Hunt*, 1 Vet. App. at 296). According to the *Allen* and *Hunt* courts, the VA's definition was reasonable because it furthered the purpose of the veterans' compensation law, which rates different injuries based upon diminished earning capacity. *Id.*
165. In *Allen*, the court concluded that because statutes should be interpreted in statutory context and because these two statutes (§ 1110 and § 1153) were located within the same title of the code, the same definition should apply to both. *Id.*
166. *Id.*

[the two interpretations available in this case] requires that such doubt be resolved in favor . . . of the veteran."[167] Thus, in *Allen*, *Gardner*'s Presumption served as a back-up citation for the court's primary reasoning.

Similarly, in *Davenport v. Brown*,[168] the Veterans Court referred to *Gardner*'s Presumption as an afterthought to its primary reasoning. In that case, the court had to determine whether a vocational rehabilitation benefits entitlement statute (38 U.S.C. § 3102) required a veteran's service-connected disability to "materially contribute" to the veteran's employment handicap.[169] In other words, the court considered whether the statute required a causal connection between the injury and the inability to work. The VA had, by regulation, interpreted the statute to require this causal connection.[170] Because the VA had interpreted the statute by regulation, *Chevron* applied. Pursuant to *Chevron*'s first step, the court rejected the VA's regulation as contrary to the clear statutory text.[171] The court then bolstered this reasoning by stating, "[s]econd, even were we to find any ambiguity, which we do not, the Supreme Court has counseled strongly that 'interpretative doubt is to be resolved in the veteran's favor.'"[172] As it had in *Allen*, the Veterans Court offered no further reasoning, explanation, or elaboration for how *Gardner*'s Presumption dictated the outcome in *Davenport*. Importantly, had the court found ambiguity, the court would have been obligated under *Chevron*'s second step to adopt the agency's interpretation, assuming it was reasonable.[173] Nevertheless, the potential conflict between *Chevron* and *Gardner* went unnoticed.

These cases and many others[174] show that the Veterans Court regularly referred to *Gardner*'s Presumption as an afterthought, using "even-if" language, and offered little if any analysis of how the Presumption applied to the facts of each case. Essentially, the court offered no more than its agreement with the veteran's interpretation as proof that it was correctly applying *Gardner*'s Presumption.[175] Likely, when the court had already

167. *Id.* (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)).
168. 7 Vet. App. 476 (1995).
169. *Id.* at 477.
170. *Id.* at 480 (citing 38 C.F.R. § 21.51(c)(2) (1994)).
171. *Id.* at 481.
172. *Id.* at 484 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).
173. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating that if Congress has not addressed a precise question, statutory interpretation falls to the relevant agency).
174. *E.g.*, Chandler v. Shinseki, 24 Vet. App. 23, 28 (2010) (mentioning *Gardner*'s Presumption in one sentence as a presumption to be mindful of); Osman v. Peake, 22 Vet. App. 252, 259 (2008) (stating that "even if" the question were a close one, *Gardner* required the court to find in the veteran's favor); *accord* Ramsey v. Nicholson, 20 Vet. App. 16, 35 (2006); Smith v. Nicholson, 19 Vet. App. 63, 78 (2005); Kilpatrick v. Principi, 16 Vet. App. 1, 6 (2002); Ryan v. West, 13 Vet. App. 151, 157 (1999); Dippel v. West, 12 Vet. App. 466, 472 (1999); Green v. Brown, 10 Vet. App. 111, 118 (1997).
175. *See* cases cited *supra* note 60 and accompanying text.

resolved the issue in the veteran's favor, *Gardner*'s Presumption lent additional supportive reasoning for the court's holding, so the court felt no need to explain its citation further.

3. Gardner*'s Presumption missing from the analysis*

When the Veterans Court resolved the issue in the VA's favor rather than the veteran's favor, however, the court often ignored the Presumption altogether.[176] For example, in *Morton v. West*,[177] a veteran appealed a VA decision that held the veteran's claims were not well-grounded.[178] The veteran alleged on appeal that the VA was required to help him develop facts to support his case even though he did not submit a well-grounded claim.[179] Yet, the statute in effect at the time was very clear to the contrary. The statute provided:

> (a) *Except when otherwise provided* . . . a person who submits a claim for benefits under a law administered by the secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist *such a claimant* in developing facts pertinent to the claims.
>
> (b) . . . . *Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.*[180]

The Secretary, interpreting this statute by regulation, had obligated the VA to help a claimant *regardless* of whether the claimant had submitted a well-grounded claim. Specifically, one regulation indicated that "'[i]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim . . . .'"[181] Another regulation provided that "'[a]lthough it is the responsibility of any person filing a claim . . . the [VA] shall assist a claimant in developing the facts pertinent to his or her claim.'"[182] Additionally, VA policy statements further obligated the VA to help in all

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176. *E.g.*, McGrath v. Gober, 14 Vet. App. 28 (2000). In McGrath, the majority held that a veteran could use medical evidence submitted after a claim was filed to establish an earlier effective date for compensation. *Id.* at 35–36. In so holding, the majority vacated the Board's determination and remanded, but did not cite *Gardner*. Judge Steinberg concurred in the holding but not the reasoning and mentioned *Gardner*'s Presumption in his analysis. *Id.* at 38 n.1, 39 (Steinberg, J., concurring and dissenting); *accord* Henderson v. Peake, 22 Vet. App. 217, 221 (2008) (dismissing appeal without citing *Gardner*).

177. 12 Vet. App. 477 (1999).

178. *Id.* at 478. Parenthetically, in 2000, the Veterans' Claims Assistance Act repealed this "well-grounded" requirement for claims, restated VA's duty to assist the claimant to develop all evidence pertinent to the claim, and required VA to inform the claimant at each step of the claims process as to what the VA will do and what the claimant must do to develop evidence sufficient to determine the merits of the claim. 38 U.S.C. § 5103(a).

179. *Morton*, 12 Vet. App. at 479–80. Even though the veteran had not properly raised this issue on appeal, the court heard it. *Id.* at 479–80.

180. *Id.* at 480 (emphasis added) (quoting 38 U.S.C. § 5107(a), (b) (1994)).

181. *Id.* at 481 (quoting 38 C.F.R. § 3.103 (1998)).

182. *Id.* (quoting 38 C.F.R. § 3.159 (1998)).

cases, regardless of whether the claim was well-grounded.[183]

The issue for the Veterans Court was whether the VA's interpretation, as contained in both the regulations and the policy statements, was controlling. Applying the first step of *Chevron*, the court found the statute was clear: the VA was obligated to assist only those claimants who submitted well-grounded claims.[184] For this reason, the court held that the VA had no authority to promulgate the inconsistent regulations and policy statements.[185] Thus, the court held against the veteran; in so doing, the court failed to mention *Gardner*'s Presumption. The court ignored the Presumption even though the court quoted another part of the *Gardner* case to support its statement that a regulation that "'flies against the plain language of the statutory text, exempts courts from any obligation to defer to it.'"[186] It is unclear why the court failed to mention *Gardner*'s Presumption. The court likely failed to do so because the statute was not ambiguous at *Chevron*'s step one. However, it would have been helpful for the court to note that fact, as it did in *Davenport v. Brown*.[187]

Similarly, in *Bazalo v. Brown*,[188] the EAJA was again at issue.[189] Remember that the EAJA allows litigants to receive attorneys' fees and expenses when they prevail in litigation against the government.[190] The issue in *Bazalo* was whether the attorney-applicants had to submit a complete, non-defective application within the thirty-day time frame to receive compensation or whether they could correct a defective application after the thirty-day time frame.[191] The Veterans Court held that a defective application could not be corrected after the thirty-day time frame.[192] In so holding, the majority relied on another canon of statutory interpretation, namely that "waiver[s] of the sovereign immunity of the United States . . . are to be strictly construed in the government's favor."[193] The majority did not mention *Gardner*'s Presumption. Again, it is unclear why, but one

183. *Id.* at 481 (citing Manual M21-1, Part III ¶ 1.03(a)).
184. *Id.* at 485.
185. *Id.*
186. *Id.* (quoting Brown v. Gardner, 513 U.S. 115, 122 (1994)).
187. *See* 7 Vet. App. 476, 481 (1995) (recognizing that the "proper starting point" is to examine the language of the statute, and that consideration of the matter ends when congressional intent is clear).
188. 9 Vet. App. 304 (1996), *rev'd sub nom.* Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998).
189. *Id.* Because the VA is not the agency administering the EAJA, the VA would not be entitled to *Chevron* deference for its interpretations of the EAJA. At best, it would be entitled to *Skidmore* deference. *See* Linda D. Jellum, *The United States Court of Appeals for Veterans' Claims: Has it Mastered* Chevron*'s Step Zero?*, 3 VETERANS L. REV. 67, 85–86 (2011) [hereinafter Chevron*'s Step Zero*].
190. *See supra* note 126 and accompanying text (describing relevant requirements for receiving attorneys' fees).
191. *Bazalo*, 9 Vet. App. at 308.
192. *Id.*
193. *Id.* (citing Grivois v. Brown, 7 Vet. App. 100, 101 (1994)).

possibility for the omission is that the court's choice of interpretive canon—that waivers of immunity be strictly construed—directly contradicted *Gardner*'s Presumption.[194]

In contrast to the majority, the dissent did refer to *Gardner*'s Presumption: "Not only does [the majority's] approach frustrate the will of Congress in expressly making the EAJA applicable to this Court, but it also contradicts the Supreme Court's recent charge that in construing a statute 'interpretive doubt is to be resolved in the veteran's favor.'"[195] The dissent disagreed with the majority's decision to adopt a "narrow" interpretation of the statute when balanced with "the interests of veterans."[196] Thus, the majority completely ignored *Gardner*'s Presumption, which the dissent found dispositive.

Similarly, in *Wright v. Gober*,[197] the Veterans Court did not mention *Gardner*'s Presumption when it held for the VA. The issue for the court was the correct effective date for a veteran's disability rating.[198] The veteran filed a claim shortly after he was discharged in 1954, but the VA denied the claim.[199] In 1990, the veteran applied to reopen the 1954 claim; the VA granted this award with an effective date of 1990.[200] The veteran appealed, arguing that the effective date should be 1954.[201] The relevant statute provided that "[t]he effective date of *an award of disability compensation* to a veteran shall be the day following the date of the veteran's discharge of release if *application therefor* is received within one year from such date of discharge or release."[202] The majority found this language clear and supportive of the VA's interpretation because although the veteran's initial claim was filed within one year of his discharge, it was denied, and the subsequent claim was filed 35 years later.[203] Although the majority again quoted the *Gardner* case for a different point, the majority did not mention *Gardner*'s Presumption.[204] The majority could have

194. Arguably, *Gardner*'s Presumption was inapplicable because the EAJA is not a veterans' benefits statute (it is a generally applicable statute), but the courts have never recognized this limitation.

195. *Bazalo*, 9 Vet. App. at 314–15 (Steinberg, J., concurring in part and dissenting in part) (citing Brown v. Gardner, 513 U.S. 115 (1994)).

196. *Id.* at 315. The dissent rejected the majority's reliance on the strict construction canon, saying that such reliance was inapplicable when the government by statute had waived its immunity, as it had with the EAJA. *Id.* In other words, once Congress has waived immunity, then courts should not "'assume the authority to narrow the waiver'" even further. *Id.* (quoting U.S. v. Kubrick, 444 U.S. 111, 117–18 (1979)).

197. 10 Vet. App. 343 (1997).

198. *Id.* at 345.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 346 (quoting 38 U.S.C. 5110(b)(1)(1994)).

203. *Id.* at 346–47.

204. *Id.* at 347.

helpfully indicated that the Presumption was inapplicable because the statute was unambiguous; however, the majority provided no such explanation. In contrast, the dissent cited *Gardner*'s Presumption as additional support for its plain meaning interpretation of the statute.[205]

These cases illustrate that when the Veterans Court interprets a statute in a way that is contrary to the veteran's position, the court routinely omits any discussion of *Gardner*'s Presumption. Often when the court fails to mention *Gardner*'s Presumption, the court first finds the statute unambiguous.[206] When the statute is clear, *Gardner*'s Presumption is inapplicable,[207] so the court's approach is arguably sound. However, the court has inconsistently explained why the Presumption is inapplicable.[208] Moreover, it is unlikely the statutes are as clear as the court suggests; indeed, in each of these cases, the dissent found the statutes ambiguous and turned to *Gardner*'s Presumption.[209] At a minimum, it would be helpful to know why the majority ignored a presumption the dissent found dispositive.

In sum, a review of all the Veterans Court's cases until 2002—when the court first acknowledged the conflict between *Gardner*'s Presumption and *Chevron*—demonstrates that the court used *Gardner*'s Presumption inconsistently, offering little guidance to future litigants. First, the court does not distinguish between those cases involving agency interpretations subject to *Chevron* deference and those not subject to *Chevron* deference. Second, the court most commonly cited the Presumption simply as back-up support, with little to no explanation of how the Presumption applied in a given case. Finally, when the court agreed with the VA or found the statutory language at issue clear, the court failed to mention the Presumption altogether. This inconsistency is hardly surprising, however, for it comes from a young court struggling to apply incompatible Supreme Court precedents.

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205. *Id.* at 351 (Kramer, J., dissenting) (noting that a VA position interpreting ambiguity would have to account for *Gardner*); *see also* Brown v. Nicholson, 21 Vet. App. 290, 297 (2007) (holding for VA and not mentioning *Gardner*'s Presumption).

206. *See, e.g.*, *Wright v. Gober*, 10 Vet. App. 343, 351 (1997) (Kramer, J. dissenting) (supporting a plain meaning interpretation of the statute).

207. *See* Terry v. Principi, 340 F.3d 1378, 1384 & n.7 (Fed. Cir. 2003) (rejecting *Gardner* as justification where language was clear and unambiguous).

208. *Compare* Davenport v. Brown, 7 Vet. App. 476 (1995) (explaining why the Presumption did not apply) *with Wright*, 10 Vet. App. at 437 (failing to recognize *Gardner*'s relevance).

209. *See Wright*, 10 Vet. App. at 349–50 (noting that discerning the plain language requires the dual consideration of the language and the structure of the statute); Bazalo v. Brown, 9 Vet. App. 304, 316 (1996) (Steinberg, J., concurring in part and dissenting in part) (finding no plain meaning in the content requirements of EAJA), *rev'd sub nom.* Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998).

B. The Federal Circuit's Use of Gardner*'s Presumption*

The Federal Circuit has limited authority to review interpretations of statutes made by the Veterans Court;[210] thus, the Federal Circuit must also interpret veterans' benefits statutes. When it does so, the court has referred to *Gardner*'s Presumption more consistently, even if less frequently, than the Veterans Court.[211] For example, in contrast to the Veterans Court, the Federal Circuit has cited *Gardner*'s Presumption regardless of whether the court adopted the VA's or veteran's interpretation.[212] Yet, like the Veterans Court, the Federal Circuit has rarely analyzed the Presumption's application to the facts of a given case. Most commonly, the Federal Circuit simply refers to *Gardner*'s Presumption to support its assertion that veterans laws are veteran-friendly.[213]

The Federal Circuit cited *Gardner*'s Presumption for the first time in

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210. The Federal Court's jurisdiction to review decisions of the Veterans Court is limited by statute. 38 U.S.C. § 7292. It has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [section 7292], and to interpret constitutional and statutory provisions to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). It can review all relevant questions of law and set aside a regulation or an interpretation of a regulation that is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observance of procedure required by law. 38 U.S.C. § 7292(d)(1). The court has no authority to review factual determinations or the application of a law or regulation to a particular set of facts unless a constitutional issue is presented. 38 U.S.C. § 7292(d)(2).

211. *See, e.g.*, Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (stating "in the face of statutory ambiguity, we must apply the rule that 'interpretive doubt is to be resolved in the veteran's favor'") (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)); *Principi*, 340 F.3d at 1383 (reaffirming *Gardner*'s Presumption when ambiguously worded statutes lead to interpretative doubt).

212. *See, e.g.*, McNight v. Gober, 131 F.3d 1483 (Fed. Cir. 1997) (per curiam). *But see* Bustos v. West, 179 F.3d 1378 (Fed. Cir. 1999). In *Bustos*, the veteran sought review of the VA's interpretation of the term "clear and unmistakable error," as provided in both a statute and regulation. *Id.* at 1380 (citing 38 C.F.R. § 3.105(a)(1999) and 38 U.S.C. § 5109A). The Federal Circuit agreed with the VA and neither cited nor mentioned *Gardner*'s Presumption. *Id.* at 1379–81. In petitioning for certiorari, the attorney for the veteran expansively argued that "*all* veteran benefits statutes and regulations are to be construed in the veteran's favor and any interpretation to the contrary is invalid." Petition for Writ of Certiorari at 3, Bustos v. West, 528 U.S. 967 (1999) (No. 99-443), 1999 WL 33640284, at *3. Further, the attorney argued, wrongly, first, that neither *King* nor *Gardner* had required a threshold finding of ambiguity and, second, that both *King* and *Gardner* had *held* that reviewing courts must interpret statutes and regulations in veterans' favor. *See id.* at *4–5 ("Such a decision clearly misunderstands this Court's holding [sic] in *King* and *Gardner*, which provide that a reviewing court must construe all veterans' benefits laws in the veteran's favor, regardless of any ambiguity.") Neither assertion is correct: both *King* and *Gardner* talked about interpretive doubt, or ambiguity, and both created the presumption in *dictum*. *See supra* Part II.B. Not surprisingly, the Supreme Court denied certiorari. *Bustos*, 528 U.S. 967.

213. *See, e.g.*, Forshey v. Gober, 226 F.3d 1299, 1305 (Fed. Cir. 2000), *rev'd sub nom*, Forshey v. Principi, 284 F.3d 1335 (Fed. Cir. 2002) (noting that pro-veteran legal presumptions reflect the compassionate intent of the veteran's system).

1997, three years after *Gardner* was decided. In *McKnight v. Gober*,[214] a veteran claimed he had service-connected asthma.[215] When the VA denied the claim, the veteran filed a claim to reopen but failed to provide "new and material evidence not previously considered."[216] For this reason, the VA denied the claim to reopen.[217] On appeal, the veteran argued that the statute obligated the VA to notify veterans of the extent and quality of evidence necessary to prove a claim, whether the VA was aware of any such evidence or not.[218] Both the Veterans Court and the Federal Circuit disagreed.[219] The statute provided, in relevant part, "[i]f a claimant's application for benefits . . . is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application."[220] There was no relevant interpreting regulation; therefore, *Chevron* did not apply.[221] The Federal Circuit held that pursuant to the statute the VA need only notify the veteran of the evidence needed to complete an application when the VA knew of or should have known of the existence of any relevant evidence.[222] In rejecting the veteran's very broad interpretation, the court referred to *Gardner*'s Presumption: "Certainly, if there is ambiguity in the statute, 'interpretive doubt is to be resolved in the veteran's favor.' Nevertheless, the language of the provision does not suggest so broad an obligation."[223] From this statement, it is not entirely clear whether the court failed to find ambiguity, and thus found *Gardner* inapplicable, or whether the court found that even if ambiguity existed, the veteran's interpretation did not comport with the statutory language. In any event, in this case, the Federal Circuit referred to *Gardner*'s Presumption even though it ultimately adopted the VA's interpretation.[224] In contrast, the Veterans Court had failed to mention the Presumption when it held for the VA.[225]

Just a year later, in *Hodge v. West*,[226] the Federal Circuit again revisited the issue of what evidence was required to reopen a denied claim. The VA had concluded that "new" evidence a veteran submitted in support of his

214. 131 F.3d 1483 (Fed. Cir. 1997) (per curiam).
215. *Id.* at 1483.
216. *Id.*
217. *Id.* at 1484.
218. *Id.*
219. *Id.*
220. 38 U.S.C. § 5103(a) (1994).
221. See *infra* Part V.D (discussing the inapplicability of *Chevron* when the litigation is between a veteran and the VA and there are no regulations interpreting the statute).
222. *McKnight*, 131 F.3d at 1485.
223. *Id.*
224. *Id.*
225. *See* McKnight v. Brown, No. 96-0440 (Vet. App. March 27, 1997), *aff'd sub nom.* McKnight v. Gober, 131 F.3d 1483 (Fed. Cir. 1997).
226. 155 F.3d 1356 (1998).

claim for service-connected arthritis was not "material"; the Veterans Court agreed.[227] The statute at issue provided that if "new and material evidence" surfaced in connection with a disallowed claim, the claim would be reopened for review.[228] A VA regulation defined "new and material evidence" as:

> evidence not previously submitted to agency decision makers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled *is so significant that it must be considered in order to fairly decide the merits of the claim.*[229]

Despite the clarity of this regulation, the Veterans Court adopted and applied a different standard.[230] The Veterans Court's standard required that there be a reasonable possibility that the new evidence would change the outcome.[231] The Federal Circuit reversed, rejecting the Veteran Court's new standard.[232] Unlike *McKnight*, *Chevron* applied in this case because there was an interpreting regulation.[233] Applying *Chevron*'s second step, the Federal Circuit held that the Veterans Court should have deferred to the VA's reasonable definition of the ambiguous statutory term "new and material evidence."[234] In addition, in a footnote, the Federal Circuit supported its holding by referring to *Gardner*'s Presumption.

> Our holding today is further supported by *Brown v. Gardner* . . . in which the Supreme Court restated the general rule that any interpretive doubt must be resolved in the veteran's favor. Indeed, because the regulation imposes a lower burden to reopen than the [Veterans Court's] test, the Secretary's construction is also the construction most favorable to the veteran.[235]

Importantly, in this case, the Federal Circuit applied *Gardner*'s Presumption in a previously unapplied way: the court used the Presumption as a tie-breaker between the VA's interpretation and the Veterans Court's interpretation.[236] (The veteran had not offered an interpretation.) Because the VA's interpretation was more veteran-friendly than the Veteran Court's interpretation and was reasonable under *Chevron*,

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227. *Id.* at 1358.
228. *Id.* at 1359 (quoting 38 U.S.C. § 5108 (1995)).
229. *Id.* (quoting 38 C.F.R. § 3.156(a) (1994)(emphasis added)).
230. *Id.* at 1360. The Veterans Court borrowed from Social Security benefits law.
231. *Id.* at 1359–60.
232. *Id.* at 1360.
233. *See infra* Part V.D (noting that Chevron applies only where an agency implemented a regulation interpreting a statute).
234. *Id.*
235. *Id.* at 1361 n.1 (citations omitted).
236. *Id*.

the VA's interpretation controlled.[237] The Federal Circuit did not address the *Chevron*/*Gardner* conflict in this case because both pointed to the same interpretation.[238]

The Federal Circuit again dodged the *Chevron*/*Gardner* conflict in *Jones v. West*.[239] In that case, the court concluded that the statutory language at issue was clear and, thus, rejected the veteran's interpretation.[240] Because the language was clear, the court indicated in a footnote that neither *Chevron* nor *Gardner* applied because both required a threshold finding of ambiguity.

> [G]iven the plain meaning of the statutory provisions at issue, it is irrelevant for purposes of this appeal whether deference is warranted under *Chevron v. Natural Resources Defense Council*, ... For similar reasons, the mandate of *Brown v. Gardner*, . . . that "interpretive doubt is to be resolved in the veteran's favor" has no bearing on the resolution of this case.[241]

The court did not recognize that the two doctrines conflicted; rather, the court simply noted that ambiguity was a threshold finding for each doctrine.[242] It would take the court two more years to acknowledge the conflict.[243]

IV. JUDICIAL RECOGNITION OF THE *CHEVRON*/*GARDNER* CONFLICT

The Veterans Court and Federal Circuit's more recent jurisprudence shows two courts struggling first to notice that *Gardner*'s Presumption and *Chevron* conflicted and, second, to resolve that conflict once they finally identified it. Simply put, the Veterans Court has never adequately resolved the conflict, exploring the issue most commonly in cases in which *Chevron* did not apply. In contrast, the Federal Circuit acknowledged the conflict earlier and attempted to resolve it in cases in which *Chevron* did apply.[244] Ultimately, both courts have concluded that *Chevron* trumps *Gardner*'s Presumption;[245] however, neither court has explained why or whether *Gardner*'s Presumption retains any vitality in light of this conclusion. The sections below explore the courts' awakening to the conflict and their attempts to resolve it.

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237. *Id.*
238. *Id.*
239. 136 F.3d 1296 (Fed. Cir. 1998).
240. *Id.* at 1300.
241. *Id.* at 1299 n.2.
242. *Id.*; *accord* Terry v. Principi, 340 F.3d 1378, 1383 (2003) (recognizing that clarity of the statute precludes the need to apply *Gardner*'s Presumption).
243. The Federal Circuit first noticed the conflict in Boyer v. West, 210 F.3d 1351 (Fed. Cir. 2000). *See infra* notes 325–330 and accompanying text.
244. *See infra* Part IV.B.
245. *See infra* Part IV.B.

A. The Veterans Court Explores the Conflict

Until 2002, the Veterans Court seemed unaware of the conflict between *Gardner*'s Presumption and *Chevron*. Then, in an unpublished opinion, the Veterans Court identified the conflict and tried to resolve it in *Jordan v. Principi*.[246] In that case, a veteran suffered a knee injury in a motorcycle accident before entering the military.[247] Yet, the veteran failed to disclose this injury upon entering service.[248] When the injury flared up, the veteran was treated and discharged for "erroneous enlistment."[249] At discharge, the VA concluded that the injury was preexisting and was not aggravated by military service.[250] Instead of challenging the decision when it was issued in 1983, the veteran waited almost fifteen years.[251] When the veteran moved in 1998 to have the 1983 decision revised or reversed based upon clear and unmistakable error, the VA denied the motion.[252]

On appeal before the Veterans Court, the parties argued about the proper interpretation of two statutes that both applied and yet conflicted.[253] Trying to reconcile these statutes long before this case, the VA had issued two interpreting regulations.[254] Because of the existence of the interpreting regulations, the court correctly noted that *Chevron* was the appropriate standard of review for determining whether the VA regulations were reasonable interpretations of the two conflicting statutes.[255] Importantly, the court then noted for the first time the tension between *Chevron* and *Gardner*, calling them "competing principles of statutory construction."[256] Applying *Chevron*'s second step, the court found the VA regulations to be reasonable interpretations of the two statutes.[257] The court then rejected the veteran's interpretation as "absurd."[258]

Placing limits on *Gardner*'s Presumption for the first time, the court noted that a veteran's interpretation would not control when that interpretation was unreasonable: "[W]e cannot blindly adopt a statutory interpretation simply because it would be beneficial to some claimants if that interpretation does not present a competing reasonable

246. 16 Vet. App. 335 (2002), *withdrawn*, No. 00-206, 2002 WL 31445159 (Nov. 1, 2002).
247. *Id.* at 336.
248. *Id.* at 337.
249. *Id.*
250. *Id.*
251. *Id.* at 337–38.
252. *Id.* at 338.
253. *Id.* at 343 (citing former 38 U.S.C. §§ 311, 353 (1979)).
254. *Id.* at 345 (citing 38 C.F.R. §§ 3.304(a) & 3.306(a) (1979)).
255. *Id.* at 346.
256. *Id.* at 345.
257. *Id.* at 348.
258. *Id.* at 347–48 (noting that the veteran's interpretation "would have the Court read [one statute] in isolation from [the other statute] in certain cases").

interpretation."[259] With this backdrop, the court tried to resolve the conflict between *Chevron* and *Gardner*'s Presumption by suggesting that *Gardner*'s Presumption should trump *Chevron*'s second step unless the veteran's interpretation was unreasonable.[260] The court's resolution of the conflict—to apply *Gardner*'s Presumption when there are two reasonable interpretations of an ambiguous statute and to otherwise apply *Chevron*—has superficial appeal. Of course a court cannot adopt unreasonable and absurd interpretations of statutes; hence, *Gardner*'s Presumption must yield when the veteran proposes an unreasonable or absurd interpretation.[261]

Yet, the resolution simply does not work. Under *Chevron*, agencies have the authority to interpret ambiguous statutes.[262] If Congress is clear, then Congress has interpreted the statute and, under *Chevron*'s first step, there is no room for agencies, courts, or even veterans to interpret that statute differently.[263] Often, however, Congress is not clear. When Congress is not clear, then agencies have the power, authority, and responsibility to choose from among reasonable, competing interpretations.[264] *Agencies* have this power, not veterans. Moreover, agencies theoretically can select only reasonable interpretations.[265] An unreasonable interpretation would never be acceptable whether the agency or the litigant provided it. Resolving the conflict between *Chevron* and *Gardner* as the court attempted to do in this case would essentially remove the VA from the interpretive process. According to the court's proposed solution, either Congress was clear and Congress decided what the statute meant, or Congress was unclear and the veteran can decide what the statute means, so long as the veteran does not propose an unreasonable or absurd interpretation. Under this proposed solution, the VA's interpretation would control only when it is the single, reasonable interpretation of a statute. The court's resolution falls short.[266]

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259. *Id.* at 348.

260. *Id.*

> [U]nder *Brown v. Gardner*, we must resolve interpretative doubt in favor of claimants only where there are competing *reasonable* interpretations of an ambiguous statutory provision and that, consequently, that interpretive doctrine cannot, by definition, be applied to lead to a statutory interpretation that produces an absurd result . . . because such and interpretation would be inherently not "reasonable."

Id.

261. *See* Pelegrini v. Principi, 18 Vet. App. 112, 128 (2004) (Ivers, J., concurring in part and dissenting in part) (noting, but not exploring, the conflict between the requirements of *Chevron* and *Gardner*).

262. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 865 (1984).

263. *Id.* at 842–43.

264. *Id.*

265. *Id.* at 843–44.

266. Interestingly, the opinion was later withdrawn from the bound volume at the court's

In 2004, the Veterans Court again explored and tried to resolve the conflict. In *Debeaord v. Principi*,[267] a veteran challenged the VA's denial of his request for an increased disability rating for vision impairment.[268] The veteran had severe vision impairment in one eye that was service-connected and less severe vision impairment in the other eye that was not service-connected.[269] A statute allowed "a veteran [who] has suffered . . . blindness in one eye as a result of service-connected disability and blindness in the other eye as a result of non-service-connected disability" to recover benefits as if each injury were service-connected.[270] The statute did not define "blindness."[271] Although the VA had a "'confusing tapestry' of regulations" defining blindness for other purposes,[272] none of these regulations specifically defined "blindness" for the statute at issue.[273] To resolve the statute's meaning, the court turned to other definitions of "blindness" in related statutes.[274] After doing so, the court rejected the veteran's interpretation because the court believed that the veteran's broad definition "would result in compensating a veteran for a non-service-connected degree of impaired vision at a rate higher than if the same degree of vision impairment *had* resulted from service."[275] In other words, the court found the veteran's interpretation to be absurd. In this case, the veteran-litigant's interpretation would benefit him, but it would harm other veterans. Balancing these competing interests is the VA's role.[276]

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request after the parties moved jointly for full panel reconsideration due to newly discovered legislative and regulatory history. Jordan v. Principi, 17 Vet. App. 261, 265 (2003). Further, the parties jointly asked the court to invalidate one of the regulations at issue. *Id.* The parties reargued the case; after rehearing, the court again rejected the veteran's statutory interpretation claims because the VA was required to apply the regulation that existed at the time the events occurred, even though the regulation was subsequently changed. *Id.* at 273–74. In the later opinion, the majority made no mention of the conflict. However, by separate opinion, Judge Steinberg, who authored the first, withdrawn opinion, reiterated the distinction, namely that *Gardner*'s Presumption "is more aptly stated as prescribing that interpretative doubt must be resolved in favor of the claimant where there are competing *reasonable* interpretations of an ambiguous statutory provision." *Id.* at 280 (Steinberg, J., writing separately). Nothing more was said.

267. 18 Vet. App. 357 (2004).
268. *Id.* at 359.
269. *Id*.
270. *Id.* at 363 (quoting 38 U.S.C. § 1160(a)(1) (2000)).
271. *Id.* at 363.
272. *Id.* at 366.
273. *Id.* at 367.
274. *Id.*
275. *Id.* at 366.
276. *See generally* DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, ANNUAL BENEFITS REPORT FISCAL YEAR (2010), *available at* http://www.vba.va.gov/REPORTS/abr/2010_abr.pdf ("The mission of the Veterans Benefits Administration (VBA), in partnership with the Veterans Health Administration and the National Cemetery Administration, is to provide benefits and services to Veterans and their families in a responsive, timely, and compassionate manner in recognition of their service to the Nation.").

Ultimately, the court did not specifically define "blindness."[277] Instead, the court concluded that the statute was not sufficiently ambiguous to require the court "to address the appellant's argument that any ambiguity in [the statute] should be resolved in his favor . . . or to consider the application of the doctrine of *Gardner* . . . ."[278] Additionally, the court noted that *Chevron* did not apply because there were no interpretive regulations.[279] Despite concluding that neither *Gardner*'s Presumption nor *Chevron* applied, the court discussed the conflict anyway and muddled the analysis further, stating:

> If we had been required to deal with an ambiguous statutory scheme, however, it is not altogether clear that we would have to abandon the directive of the Supreme Court in *Gardner*, that "interpretive doubt is to be resolved in the veteran's favor," a directive derived from *King v. St. Vincent's Hospital*, . . . a case issued seven years after *Chevron*, that applied that interpretive principle to "read [a regulation] in [the veteran's] favor," and that drew that principle from *Fishgold v. Sullivan Drydock & Repair Corp.*, . . . a case decided long before *Chevron* . . . . Not only was that canon confirmed by the Supreme Court in *Gardner* ten years after *Chevron*, but it is one tailored specifically to veterans' benefits statutes as contrasted with the more general statutory construction principle set forth in *Chevron* . . . . In the last analysis, guidance from the Supreme Court would appear necessary to resolve this matter definitively.[280]

The court's analysis is incorrect in several ways. First, *Debeaord* did not actually involve a conflict between *Chevron* and *Gardner*'s Presumption. Because there was no regulation interpreting the statute at issue, *Chevron* simply did not apply.[281] Because there was no conflict, the court should not have addressed the issue; therefore, this language is dictum at best.

Second, the Veterans Court found it relevant that the Supreme Court created *Gardner*'s Presumption in a case resolved before the Court decided *Chevron*—in *Fishgold*[282]—and then reaffirmed the existence of the Presumption in a case decided after the Court decided *Chevron*—in *King*.[283] *King*'s reaffirmation of *Fishgold*, the court concluded, meant that *Gardner*'s Presumption should prevail over *Chevron* whenever there is

277. Debeaord v. Principi, 18 Vet. App. 357, 368 (2004).
278. *Id.*
279. *Id.*
280. *Id.* (modification in original).
281. *See supra* Part II.C (explaining *Chevron* deference and its limits). Whether the analysis from Skidmore v. Swift, Co., 323 U.S. 134 (1944) should have applied is another question, one beyond the scope of this article. *See generally* Jellum, Chevron*'s Step Zero*, *supra* note 189 at 85–86 (2011) (exploring when *Chevron* deference rather than *Skidmore* deference is appropriate in the context of veteran's jurisprudence).
282. 328 U.S. 275 (1946).
283. 502 U.S. 215 (1991).

conflict.[284] Yet, this conclusion is based on an incomplete analysis of the underlying cases. Neither *King* nor *Fishgold* involved agency interpretations of statutes; hence, *Chevron* would not have applied in either of those cases. Whether *Chevron* was decided before or after those cases were decided is thus completely irrelevant to the resolution of the conflict between *Chevron* and *Gardner*. It is possible that in cases in which a court interprets a statute without the aid of an agency interpretation, *Gardner* should apply and that in cases in which a court interprets a statute with the aid of an agency interpretation, *Chevron* should apply.[285] Simply put, the timing of the cases, without more, tells us nothing because the Supreme Court did not address the issue.

Finally, the Veterans Court finished its analysis in *Debeaord* by noting that specific statutory provisions control general statutory provisions when there is a conflict.[286] This principle is indeed accurate. Yet, the court implies that this principle resolves the conflict between *Gardner*'s Presumption and *Chevron*. The court suggests that *Gardner*'s Presumption, a specific interpretive canon, should control over *Chevron*, a general interpretive canon, when there is conflict because of the specific-general canon of interpretation.[287] But this specific-general canon is an interpretive method for resolving conflicting *statutes*; it is not an interpretive method for resolving conflicting *canons* of interpretation and, to my knowledge, has never before been used as such.[288] Further, it should not be used as such because the specific-general canon is based on legislative behavior rather than judicial behavior.[289] The canon presumes that legislatures are aware of all existing statutes when they enact new statutes and that legislatures would expect a specific statute to apply over a conflicting, general one.[290] Thus, the specific-general canon cannot resolve the conflict between *Gardner*'s Presumption and *Chevron*, and the court's reliance on it was misplaced. Perhaps the most persuasive point in the court's analysis is its parting comment—that the Supreme Court should "resolve this matter definitively."[291]

Two years later, in 2006, the Veterans Court tried again to resolve the conflict, this time suggesting that *Chevron* should trump *Gardner*'s Presumption. In *Haas v. Nicholson*,[292] the court addressed whether a

284. *DeBeaord*, 18 Vet. App. at 368 (2004).
285. See *infra* Parts V.C & V.D (discussing cases in which the court has come out on either side of this debate).
286. DeBeaord v. Principi, 18 Vet. App. 357, 368 (2004).
287. *Id.*
288. JELLUM, MASTERING STATUTORY INTERPRETATION, *supra* note 59, at 140–44.
289. *Id.* at 141.
290. *Id.*
291. *Debeaord*, 18 Vet. App. at 368.
292. 20 Vet. App. 257 (2006), *rev'd sub nom.* Haas v. Peake, 525 F.3d 1168 (Fed. Cir.

veteran who served on a ship that traveled near the coastal waters of Vietnam but who never went ashore "served in the Republic of Vietnam."[293] A statute presumed that any veteran who "served in the Republic of Vietnam" during specified time periods was exposed to Agent Orange.[294] The VA promulgated a regulation interpreting this statutory phrase to apply only to those service members whose service involved "duty or visitation" in Vietnam.[295] The VA then interpreted the phrase "duty or visitation" in its regulation to apply only to veterans who had physically set foot in Vietnam, even if only for a short time.[296] Because Haas had served on a ship that was located near Vietnam but had never actually set foot in the country, the VA denied his claim for benefits.[297]

Haas appealed, and the Veterans Court reversed.[298] In its reasoning, the court looked first to the statute, acknowledging that it was ambiguous.[299] The court then turned to *Chevron*.[300] Before applying *Chevron*, however, the court pointed out in a footnote that *Gardner*'s Presumption did not apply because *Chevron* did:

> It is noteworthy that the U.S. Supreme Court's decision in *Brown v. Gardner* . . . does not appear to apply in this instance. In *Terry v. Principi*, the [Federal Circuit] observed that the principle enunciated in *Brown* is "a canon of statutory construction that requires that resolution of interpretive doubt arising from statutory language be resolved in favor of the veteran . . . ." The Federal Circuit then concluded that the canon "does not affect the determination of whether an agency's regulation is a permissible construction of a statute."[301]

The court said nothing more about *Gardner* and *Chevron*. Instead, the court found the regulation ambiguous and turned to evaluate the VA's interpretation of its regulation—that "duty or visitation" meant a veteran must have actually stepped onto the land.[302] The court then rejected the VA's interpretation of its own regulation.[303] In doing so, the court

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2008).

293. *Nicholson*, 20 Vet. App. at 263 (quoting 38 U.S.C. 1116(f) (2000)).

294. *Id.*

295. *Id.* at 269 (citing 38 C.F.R. § 3.307(a)(6)(iii) (2006)).

296. *Id.* at 267.

297. *Id.* at 259.

298. *Id.*

299. *Id.*

300. *Id.* at 269. Notably, *Chevron* is not the appropriate deference standard when an agency interprets its own regulation; *Auer* is. JELLUM, MASTERING STATUTORY INTERPRETATION, *supra* note 59, at 227. Although it is possible that because the regulation merely parroted the statute, neither *Chevron* nor *Auer* applied pursuant to *Gonzales v. Oregon*, 546 U.S. 243 (2006).

301. 20 Vet. App. at 269 n.4.

302. *Id.* at 269.

303. *Id.* An agency's interpretation of its own regulation is respected unless it is plainly wrong. *See* Kerr, *supra* note 84. It is hard to see how the VA's interpretation of this regulation could have been plainly wrong. The term "duty or visitation" is at least

substituted its own interpretation rather than determine that the VA's interpretation was "plainly erroneous."[304] The case was reversed on appeal for this reason.[305]

In 2007, in *Sursely v. Peake*,[306] the Veterans Court again noted the conflict between *Gardner*'s Presumption and *Chevron*, but did not try to resolve the conflict. In this case, the court affirmed a VA decision that refused a veteran's request for two separate clothing allowances.[307] The relevant statute authorized clothing allowances for disabled veterans who use a prosthetic or orthopedic appliance that tends to wear out or tear clothing.[308] Because the veteran had two separate disabilities, he had requested two separate clothing allowances.[309] The VA denied the second claim because the relevant statute used the singular: "shall pay *a* clothing allowance of $662 per year . . . ."[310] The Veterans Court affirmed the denial, finding the statutory language clear.[311] The court did not initially mention *Gardner*'s Presumption because it found the statute unambiguous.[312] However, the court later turned its attention to an interpreting regulation to determine whether *Gardner*'s Presumption applied.[313] The court discussed, but did not resolve, the conflict between *Chevron*'s second step and *Gardner*'s Presumption:[314]

> The Federal Circuit has discussed the relationship between *Brown* and the second part of the *Chevron* analysis, cautioning that "a veteran 'cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision,'" that "where the meaning of a statutory provision is ambiguous, [the Court] must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case," and that "[w]here a statute is ambiguous and the

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ambiguous regarding whether a veteran had to step onto Vietnamese soil; indeed, requiring the veteran to actually step onto the land seems reasonable. Because the VA's interpretation was not plainly wrong, the Veterans Court should have upheld the regulation. Instead, the court rejected this interpretation because it was "inconsistent" with precedent, was "plainly erroneous" pursuant to the legislative history, and was an "unreasonable" interpretation of the regulations. *Nicholson*, 20 Vet. App. at 270.

304. *Id.*
305. Haas v. Peake, 525 F.3d 1168, 1197 (Fed. Cir. 2008).
306. 22 Vet. App. 21 (2007), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009).
307. *Id.* at 27–28.
308. *Id.* at 23.
309. *Id.*
310. *Id.* (referring to 38 U.S.C. § 1162 (2006) (emphasis added)).
311. *Id.* at 22 ("The statutory language . . . clearly provides only one clothing allowance per eligible veteran . . . ").
312. *Id.* at 26.
313. *Id.*
314. *Id*. at 26. In so doing, the court referred to the Federal Circuit's decisions in *Disabled American Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000), *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000), and *Sears v. Principi*, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003), discussed *supra* in Part IV.

> administering agency has issued a reasonable gap-filling or ambiguity-resolving regulation, [the Court] must uphold that regulation."[315]

After describing the Federal Circuit's concerns, the court found that the regulation and statute were clear and therefore, "[there was] no reason to apply [*Gardner*'s Presumption] in this instance."[316]

On appeal, the Federal Circuit disagreed and reversed.[317] Finding that the regulation merely parroted the statute, the court refused to apply *Chevron*.[318] Instead, the court found that the legislative history and *Gardner*'s Presumption were dispositive.[319] Thus, in *Sursely* the Federal Circuit found *Gardner*'s Presumption (and the legislative history) to be dispositive,[320] while the Veterans Court did not apply *Gardner*'s Presumption because the statute was clear.[321] In short, the jurisprudence of the two courts was at odds.

B. The Federal Circuit Explores the Conflict

The Federal Circuit first noted the possible conflict in 2000,[322] two years earlier than the Veterans Court. The following year, the Federal Circuit suggested that *Gardner*'s Presumption did not apply in cases involving *Chevron*.[323] At one time, the court suggested in dictum that *Gardner*'s Presumption was merely a canon of last resort when all other avenues for resolving ambiguity, including *Chevron*, fail.[324] After struggling with the conflict for a number of years, in 2011 the court returned to its original position that *Chevron* trumped *Gardner*. *Gardner*'s Presumption had fallen from grace.

The first case in which the Federal Circuit addressed this issue of the interplay between *Gardner*'s Presumption and *Chevron* was *Boyer v. West*.[325] In that case, the veteran raised the conflict by arguing that

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315. *Sursely*, 22 Vet. App. at 26 (alteration in original) (citations omitted).
316. *Id.* at 27.
317. Sursely v. Peake, 551 F.3d 1351 (Fed. Cir. 2009).
318. *Id.* at 1355. ("The regulation uses the word 'the' rather than the statute's 'a' in reference to the term 'clothing allowance.' Changing articles from 'a' to 'the' does nothing to resolve the question at issue, and does not reflect a deliberate effort to interpret the statute's meaning."). The court correctly refused to apply *Chevron* deference to an agency's interpretation of a parroting regulation pursuant to the Supreme Court's holding in *Gonzales v. Oregon*, 546 U.S. 243 (2006).
319. *Sursely*, 551 F.3d at 1357 (referencing both Congressional intent and *Gardner* in holding in the veteran's favor).
320. *Id.*
321. Sursely v. Peake, 22 Vet. App. 21, 22 (2007), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009).
322. Boyer v. West, 210 F.3d 1351, 1355 (Fed. Cir. 2000).
323. Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001).
324. Terri v. Principi, 340 F.3d 1378, 1383 (Fed. Cir. 2003).
325. 210 F.3d 1351 (Fed. Cir. 2000). In this case, a veteran challenged the VA's refusal to consider the hearing loss in his right ear when evaluating whether he had service-

Gardner's Presumption always trumped *Chevron*.[326] However, the veteran was ill-advised to make this argument because *Chevron* was inapplicable; there was no regulation interpreting the statutory provision.[327] Although *Chevron* did not apply, the Federal Circuit responded to the veteran's argument anyway, stating that *Gardner*'s Presumption did not apply when the statute was clear.[328] Here, the court concluded that the statute was clear and that the VA's interpretation was consistent with the unambiguous language.[329] The court then cautioned veterans not to "rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision."[330] Because *Chevron* did not apply and because the language of the statute was clear, the court had no reason to respond further to the veteran's argument that *Gardner*'s Presumption always trumped *Chevron*.

A short time later, however, the Federal Circuit addressed the conflict more directly. In *Disabled American Veterans v. Gober*,[331] the statute at issue allowed veterans to challenge existing VA decisions for "clear and unmistakable error."[332] The VA had issued regulations interpreting this language; thus, *Chevron* applied.[333] Noting the conflict between *Gardner*'s Presumption and *Chevron*, the court cautioned litigants that while *Gardner*'s Presumption may alter the analysis, it does not trump *Chevron*.[334] Thus, the court recognized that the two doctrines were in tension, but the court was unaware of, or at least did not articulate, the extent of this tension. In any event, the court had no need to resolve the conflict because the issue on appeal involved a procedural challenge rather than an interpretive challenge.[335] Thus, the court offered no further

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connected hearing loss in his left ear. *Id.* at 1352.

326. *Id.* at 1354.

327. *Id.* at 1354–55 (citing 38 C.F.R. § 4.85(f) (2000)). Although the VA subsequently codified its interpretation. *Id.*

328. *See id.* at 1355 (citations omitted) (recognizing that *Gardner*'s Presumption applies when a court finds ambiguity in a veterans' benefits statute).

329. *Id.* at 1352.

330. *Id.* at 1355.

331. 234 F.3d 682 (Fed. Cir. 2000).

332. *Id.* at 695.

333. *Id.* at 686. Several veterans groups challenged the regulations on procedural and interpretive grounds. *Id.*

334. *Id.* at 692. Specifically, the court said:

> *Chevron* deference applies if Congress is either silent or unclear on a particular issue. However, modifying the traditional *Chevron* analysis is the doctrine governing the interpretation of ambiguities in veterans' benefit statutes—that "interpretative doubt is to be resolved in the veteran's favor." Yet, "[a]t the same time, we have also recognized that a veteran 'cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.'"

Id. at 691–92 (citations omitted).

335. *Id.* at 692. The veteran argued that the VA acted arbitrarily and capriciously by failing to provide an adequate statement of the basis and purpose for the rules at issue and

guidance on how *Gardner* modified *Chevron*.

One year later, in 2001, the Federal Circuit referred to the conflict yet again in dictum, this time suggesting that *Gardner*'s Presumption might be a part of *Chevron*'s first step. In *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*,[336] the statute at issue provided that specific benefits would be awarded to veterans "who [were] . . . entitled to receive . . . compensation at the time of death . . . ."[337] The court concluded that the phrase "entitled to receive" was ambiguous because the legislative history suggested one interpretation while *Gardner*'s Presumption suggested another.[338] The court noted that "it is a well-established rule of statutory construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'"[339] *Chevron* was not an issue in this case because the interpreting regulation was not issued through notice and comment procedures.[340] Despite this fact, the court noted that if *Chevron* applied, the next step in the court's analysis would be to apply *Chevron* because the traditional tools of statutory interpretation pointed in opposite directions.[341] In saying that *Chevron*—meaning *Chevron*'s second step—would be the next step, the court suggested that *Gardner*'s Presumption should be part of *Chevron*'s first step. In other words, the court seemed to be suggesting that if *Gardner*'s Presumption were to resolve any ambiguity at *Chevron*'s first step, then *Chevron*'s second step would be unnecessary. Ultimately, the court remanded *National Organization of Veterans' Advocates, Inc.* on other grounds.[342]

In 2003, the Federal Circuit addressed the conflict head on.[343] In *Sears*

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that the VA did not respond adequately to comments submitted during the rulemaking process. *Id.*

336. 260 F.3d 1365 (Fed. Cir. 2001).

337. *Id.* at 1377 (quoting 38 U.S.C. § 1318(b) (Supp. V 1999)).

338. *Id.* at 1377–78. The court noted that the canons of interpretation for resolving that ambiguity pointed in different directions. Specifically, the legislative history was relatively clear that the VA's interpretation was correct. *Id.* at 1377.

339. *Id.* at 1378 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)). Thus, although one of the traditional tools of interpretation (legislative history) directly supported the VA's interpretative regulation, the Federal Circuit essentially ignored that history pursuant to *Gardner*'s Presumption simply because the interpretation was less favorable to the veteran. *Id.*

340. *Id.* at 1378 (stating imprecisely "[w]hile the parties do not argue the point, the Supreme Court has held that *Chevron* deference does not normally apply to informal rulemakings.").

341. *Id.* at 1378–79.

342. *Id.* at 1380–81 (remanding for the VA to reconcile an inconsistency between the regulation at issue and another VA regulation).

343. In 2003, the Federal Circuit also briefly mentioned both doctrines in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 330 F.3d 1345, 1350 (Fed. Cir. 2003). Note that this case has the same name as *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001). However, the cases are unrelated. In the 2003 case, the court failed to acknowledge, let

v. Principi,[344] the court soundly rejected the veteran's argument that "ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans' benefits scheme overrides *Chevron* deference."[345] At issue was a VA regulation that established an effective date for a veteran's post traumatic stress disorder claim.[346] The statute provided that the effective date of such a claim "shall not be earlier than the date of receipt of application therefor."[347] The VA had issued a regulation interpreting this language such that the effective date for reopening a claim was the "[d]ate of receipt of new claim or date entitlement arose, whichever [was] later."[348] Thus, the VA interpreted the relevant statute to permit the earliest effective date of a reopened claim to be the date of the application for reopening rather than the date of the original denial; that interpretation in this case caused the veteran to lose five years' worth of benefits.[349]

On appeal, the veteran argued that the regulation was inconsistent with the statutory language and, alternatively, that the regulation was inconsistent with "the pro-claimant policy permeating Title 38."[350] The court applied *Chevron*, finding first that the statutory language was ambiguous and finding second that the VA's interpretation was reasonable.[351] Turning to the veteran's alternative argument—that *Gardner*'s Presumption always trumps *Chevron*—the court said that "[e]ven where the meaning of a statutory provision is ambiguous, we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case."[352] Indeed, the court noted that neither it nor the veteran

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alone resolve, any conflict. Instead, the court said simply:

> The first inquiry under 5 U.S.C. § 706, in which we interpret the meaning of relevant statutes, is governed by the standards established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 . . . . Thus, *Chevron* deference applies if Congress is either silent or ambiguous on a particular issue. However, when interpreting statutes relating to veterans, "interpretive doubt is to be resolved in the veteran's favor."

330 F.3d at 1349–50 (quoting 260 F.3d at 1378).

Although the court identified both doctrines, the court did not acknowledge that the two conflicted. Moreover, the court neither applied nor mentioned *Chevron* nor *Gardner* again in the remainder of the opinion. *Id.* at 1350–52. The court did note that the VA had argued that its regulation was entitled to *Chevron* deference, but the court itself did not apply the *Chevron* two-step analysis. *Id.* at 1350. Instead, the court said simply that the VA's regulations were consistent with the statute and were, therefore, valid. *Id.* at 1352.

344. 349 F.3d 1326 (Fed. Cir. 2003).
345. *Id.* at 1331.
346. *Id.* at 1329.
347. *Id.* at 1328 (quoting 38 U.S.C. § 5110(a) (2000)).
348. *Id.* at 1328 (quoting 38 C.F.R. § 3.400(q)(1)(ii) (2003)).
349. *Id.*
350. *Id.*
351. *Id.* at 1330.
352. *Id.* at 1331–32.

could identify "a single case in which this court has invalidated a regulation that would otherwise be entitled to *Chevron* deference on this ground."[353] Thus, in this case, *Gardner*'s Presumption lost to *Chevron*; however, the Federal Circuit did not explain specifically how to resolve the conflict. Rather, *Gardner*'s Presumption simply played no role in the court's reasoning. Perhaps the court believed that *Gardner*'s Presumption simply has no role in cases in which *Chevron* applies,[354] but if so, the court could have stated so more clearly.

Later that same year, the Federal Circuit clarified that *Gardner*'s Presumption did not apply in cases in which *Chevron* applied. In *Terry v. Principi*,[355] the veteran sought compensation for an eye condition that the VA had excluded from coverage.[356] The relevant statute provided that only those disabilities attributable to an "injury" or a "disease" incurred or aggravated "in [the] line of duty" were compensable.[357] The VA by regulation had excluded certain conditions, including "refractive error of the eye," from the terms "injury" and "disease."[358] Thus, the VA denied the claim, and the veteran appealed.[359] On appeal, the Federal Circuit applied *Chevron*, holding that the statute was ambiguous and the VA's interpretation was a reasonable interpretation of that ambiguous language.[360] The court then soundly rejected the veteran's argument that "an otherwise reasonable interpretation of a statute by the VA is impermissible if the statute is not liberally construed in favor of the veteran [pursuant to *Gardner*'s Presumption]."[361] Directly addressing the conflict, the court stated that *Gardner*'s Presumption "does not affect the determination of whether an agency's regulation is a permissible construction of a statute."[362] In other words, *Gardner*'s Presumption simply does not apply when *Chevron* does.

Seven years later, in 2010, the Federal Circuit contradicted itself when it again addressed the conflict in dictum. This time the court suggested that *Gardner*'s Presumption might apply in a case involving *Chevron*, but that *Gardner*'s Presumption should be used only as a canon of last resort. Specifically, in *Nielson v. Shinseki*,[363] the veteran lost almost all his teeth as

353. *Id.* at 1332.
354. *See infra* Part V.E.
355. 340 F.3d 1378 (Fed. Cir. 2003).
356. *Id.* at 1380.
357. *Id.* at 1382 (quoting 38 U.S.C. §§ 1110, 1131 (2000)).
358. *Id.* at 1383 (quoting 38 C.F.R. § 3.303(c) (2003)).
359. *Id.* at 1381.
360. *Id.* at 1383–84.
361. *Id.* at 1384.
362. *Id.* (citing Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001)).
363. 607 F.3d 802 (Fed. Cir. 2010).

a result of a severe periodontal infection while in the service.[364] The VA granted him service connection for the loss of teeth,[365] but denied his request for dentures pursuant to a statute that provided veterans with "outpatient dental care and related dental appliances" for service-connected wounds or "'other service trauma.'"[366] The issue for the court was whether dental treatment could be considered a "service trauma."[367] The VA rejected this interpretation, stating that "'service trauma' does not include the intended result of proper medical treatment provided by the military."[368]

Because the VA had not interpreted this language by regulation, *Chevron* did not apply.[369] Nonetheless, the court addressed the conflict between *Chevron* and *Gardner*'s Presumption because the veteran had argued that *Gardner*'s Presumption should be the first place for a court to turn in the face of statutory ambiguity.[370] The Federal Circuit in dictum rejected this argument: "The mere fact that the particular words of the statute—that is, "service trauma"—standing alone might be ambiguous does not compel us to resort to [*Gardner*'s Presumption]. Rather, that canon is only applicable after other interpretive guidelines have been exhausted, including *Chevron*."[371] In other words, *Gardner*'s Presumption applies only when a statute remains ambiguous after other common interpretive canons have been applied and other sources of meaning have been searched, including *Chevron*'s second step.[372]

This approach is simply wrong. If the dictum in *Nielson* were correct, then the only time *Gardner*'s Presumption would apply in a *Chevron* case

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364. *Id*. at 804.
365. *Id.*
366. *Id*. (quoting 38 U.S.C. § 1712(a)(1)(C)).
367. *Id.*
368. *Id*. at 805.
369. *See id.* (applying a tool of statutory interpretation to give undefined words their ordinary meaning).
370. *See id.* at 808.
371. *Id.* The court cited to a number of its prior precedents as support for its assertion. *See id.* at n.4
372. Similarly, the dissenting judges in *Carpenter v. Principi* used this last-resort approach. 15 Vet. App. 64, 88–89 (2001). Whereas the majority viewed the presumption as a canon of *first* resort, the dissenting judges viewed the presumption as a canon of *last* resort. *Id.* Both dissenting judges proposed that before the court should resort to the presumption, other potential sources of meaning, such as legislative history, should be examined. For example, Judge Steinberg argued that "it is incumbent on the Court to explore both the legislative history as well as the caselaw . . ." before rendering an interpretation. *Id.* at 91 (Steinberg, J., concurring in part and dissenting in part). Similarly, Chief Judge Kramer complained that "the majority makes [its] holding, ostensibly based on the veterans benefits precept that any interpretive doubt as to the meaning of the statute . . . must be resolved in favor of the veteran, without discussing pertinent legislative history." *Id.* at 94 (Kramer, C.J., dissenting). Hence, the dissenting judges viewed *Gardner*'s Presumption as a canon to apply when the traditional tools of statutory interpretation fail to resolve ambiguity. Only when other avenues of meaning fail should any remaining interpretive doubt be resolved in the veteran's favor.

would be when the VA interpreted the statute in an unreasonable manner, because if the VA interpreted the statute in a reasonable manner, then no ambiguity would remain. Admittedly, such an approach would greatly lessen the conflict between *Chevron*'s second step and *Gardner*'s Presumption for fewer statutes would be ambiguous if other avenues were first explored. However, such an approach would eviscerate *Gardner*'s Presumption as it would be rare that the other tools of construction, especially *Chevron*'s second step, would not have resolved the ambiguity. *Gardner*'s Presumption, as originally formulated, furthers the important policies of rewarding veterans for their service and helping them return to civilian life; hence, eviscerating *Gardner*'s Presumption is not an ideal solution. Moreover, with this dictum, the court ignored its earlier suggestion from both *Terry* and *Sears* that *Gardner*'s Presumption does not apply in cases involving *Chevron*.[373]

In sum, the Federal Circuit has approached the *Chevron*/*Gardner* conflict somewhat inconsistently. For this court, *Gardner*'s Presumption has morphed from a veteran's ace in the hole, to a canon of last resort, to a doctrine effectively ignored. In the court's most recent case to address this issue, *Guerra v. Shinseki*,[374] the majority returned to its position from *Terry* and *Sears*—that *Chevron*'s second step trumped *Gardner*'s Presumption. In *Guerra*, the majority made clear that *Gardner*'s Presumption yields to *Chevron*,[375] while the dissent believed that *Chevron* yields to *Gardner*'s Presumption.[376] So, which understanding is correct? Should *Gardner*'s Presumption replace *Chevron*'s second step, become a canon of last resort applied only when the VA's interpretation is unreasonable, or have no application in *Chevron* cases? The next section offers various ways to resolve this conflict.

V. RESOLVING THE CONFLICT

This section identifies and explores ways to resolve the conflict between *Gardner*'s Presumption and *Chevron*. In sum, *Gardner*'s Presumption must be returned to its original form: a directive to liberally construe veterans' benefits statutes. In its current super-strong form, it should play no role in cases involving VA interpretations entitled to *Chevron* deference

373. *See* Terry v. Principi, 340 F.3d 1378, 1382–83 (Fed. Cir. 2003) (choosing to apply *Chevron* rather than *Gardner*'s Presumption); Sears v. Principi, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003) (applying the *Chevron* approach).

374. 642 F.3d 1046 (Fed. Cir. 2011). The facts and reasoning of this case are detailed in *infra* Part V.C.3.

375. 642 F.3d at 1051 (rejecting the argument that *Gardner*'s Presumption overrides *Chevron* deference).

376. *See id.* at 1052–54 (Gajarsa, C.J., dissenting) (claiming that the majority should have turned to *Gardner*'s Presumption rather than *Chevron*'s second step after finding the statute ambiguous).

because these two interpretive canons are irreconcilable.[377] In contrast, as a liberal construction canon, *Gardner*'s Presumption could be relevant at *Chevron*'s first step, as are other liberal construction canons. However it is formulated, *Gardner*'s Presumption is never relevant during *Chevron*'s second step because at this point the VA's reasonable interpretation is entitled to respect. Additionally, in those cases in which the VA's interpretation is not entitled to *Chevron* deference, *Gardner*'s Presumption might play a role as a valid tie-breaker—a presumption that rewards veterans for their sacrifice and helps them assimilate back into society. Finally, and most promisingly, *Gardner*'s Presumption might be viewed as a duty belonging to the VA rather than as an interpretive tool belonging to courts; however, only one court in one instance has explicitly applied this approach. The next section explores these possible solutions.

A. Gardner*'s Presumption Should Re-morph*

Regardless of any other changes made to *Gardner*'s Presumption, courts should transform the Presumption back to the liberal construction canon of its youth. A liberal construction canon is sufficiently veteran-friendly, without being overly veteran-friendly, to accommodate competing interests. Moreover, such an approach would allow the VA to consider the best approach for veterans as a whole rather than allowing one particular veteran to highjack the interpretive process.

When the Supreme Court first created and applied what I have called *Gardner*'s Presumption in *Boone*, the Court simply applied the familiar interpretive canon that remedial statutes should be construed liberally.[378] This formulation of *Gardner*'s Presumption (*Boone*'s interpretive canon) made sense: when a statute was ambiguous, putting the veterans' interests above private individuals' interests and above governmental interests rewarded veterans for their service to this country and helped them assimilate back into society.[379] Then, the Supreme Court in *King* transformed *Boone*'s interpretive canon from a simple directive to courts to construe veterans' statutes liberally into a terse directive to courts to construe such statutes in favor of veterans.[380] That change was neither explained nor necessary. Notably, the Supreme Court developed *Gardner*'s Presumption into its super-strong formulation in *King* and then applied that formulation to cases involving VA interpretations in *Gardner*

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377. *See* Jellum, Chevron*'s Step Zero*, *supra* note 189 at 84–85 (2011) (explaining when *Chevron* rather than *Skidmore* deference is the appropriate standard for courts to use to review VA interpretations of statutes).

378. *See Boone*, 319 U.S. 561, 575 (1943) (construing the Soldiers' and Sailors' Civil Relief Act liberally to favor those who have sacrificed to serve the nation).

379. *See* cases cited *supra* note 60 and accompanying text.

380. King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 (1991).

shortly after VA decisions first became subject to judicial review.[381] The Court may have transformed the Presumption as a way to encourage the VA to act in a veteran-friendly way or to encourage the new Veterans Court to err on the side of the veteran when interpreting veterans' benefits statutes. If accurate, the super-strong rendition of *Gardner*'s Presumption could be viewed as serving a transitional function—a function that should no longer be necessary now that judicial review of VA decisions is more than twenty-five years old.

Recent Supreme Court jurisprudence shows that the Court strongly supports a liberal approach to interpreting veterans' statutes generally. Illustratively, in *Henderson* the Court broadly interpreted a procedural statute.[382] The statute at issue gave a veteran 120 days to appeal a VA decision to the Veterans Court.[383] The veteran filed fifteen days late.[384] The Veterans Court and the Federal Circuit had both interpreted the statute strictly and dismissed the claim pursuant to an earlier Supreme Court case that held that such statutes were jurisdictional and thus, should be strictly construed.[385] The Supreme Court reversed and said that this statute was not jurisdictional.[386] In doing so, the Court stressed that the uniqueness of veterans law cautioned against strict interpretations in general.[387] Specifically, the Court mentioned that "Congress' longstanding solicitude for veterans is plainly reflected in the [Veterans' Judicial Review Act] and in subsequent laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions . . . .'"[388] Additionally, the Court mentioned *Gardner*'s Presumption, noting that "[w]e have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'"[389] With this language, the Court once again noted that veterans' statutes should be broadly interpreted owing to the pro-claimant, veteran-friendly nature of veterans law.[390] However, while the Supreme Court continues to quote *Gardner*'s Presumption in its super-strong formulation, the Court's

381. *See* Ridgway, *supra* note 20 (discussing the development of judicial review in the VA system).
382. Henderson v. Shinseki, 131 S. Ct. 1197, 1198 (2011).
383. *Id.*
384. *Id.*
385. *Id.* (citing Bowles v. Russell, 551 U.S. 205 (2007)).
386. *Id.* at 1206.
387. *See id.* at 1199 (explaining differences between civil litigation and administrative litigation in veterans court).
388. *Id.* at 1199 (citations omitted).
389. *Id.* at 1206 (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991)).
390. *Id.* In another case, the Court mentioned that "Congress' special solicitude for veterans might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other cases . . . ." Shinseki v. Sanders, 129 S. Ct. 1696, 1700 (2009) (finding against the veteran).

rhetoric would also support the Presumption being returned to a liberal construction canon.

Another reason to transform *Gardner*'s Presumption back into a liberal construction canon is that the current formation is difficult to apply. For example, exactly how favorable to veterans must an interpretation be to survive analysis under *Gardner*'s Presumption? The Federal Circuit raised this concern in *Haas v. Peake*.[391] As noted earlier, the issue for the court in that case was whether a veteran who served on a ship that traveled near Vietnam but who never went ashore "served in the Republic of Vietnam."[392] The VA had promulgated a regulation interpreting this phrase to apply only to those veterans whose service involved "duty or visitation" in Vietnam.[393] The VA then interpreted the phrase "duty or visitation" in the regulation to apply only to veterans who had physically set foot in Vietnam, even if only for a short time.[394] The veteran had appealed the VA's decision and lost.[395]

Before the Federal Circuit in a petition for rehearing, the veteran argued that the Veterans Court should have applied *Gardner*'s Presumption.[396] The Federal Circuit disagreed. In holding that the veteran had waived the argument that *Gardner*'s Presumption applied by not raising the issue in his original appeal, the court noted one difficulty of applying the Presumption: "this case would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant.'"[397] Specifically, the VA had already interpreted the statute in a pro-veteran manner by applying the language to any veteran who had set foot on land, for however long.[398] Haas wanted an even more pro-veteran interpretation, one that favored him.[399]

Veteran-litigants are likely to suggest that an interpretation is sufficiently veteran-friendly only when it would allow them to win their cases. Yet, such an answer potentially pits the veteran-litigant against all other veterans. Whenever a veteran is in danger of losing benefits under the VA's interpretation of a statute, that veteran will allege that the VA's interpretation is not veteran-friendly enough. Unless the veteran's alternative interpretation is absurd, the courts' current articulation of *Gardner*'s Presumption suggests that the veteran must win.[400] If instead,

391. 544 F.3d 1306 (Fed. Cir. 2008) (per curiam).
392. *Id.* at 1307–08.
393. *Id.* at 1308 (citing 38 C.F.R. § 3.307(a)(6)(iii)).
394. *Id.* at 1308–09.
395. Haas v. Peake, 525 F.3d 1168, 1168–69 (Fed. Cir. 2008).
396. *Haas*, 544 F.3d at 1308.
397. *Id.* at 1308–09.
398. *Id.* at 1309.
399. *Id.* at 1308.
400. *See, e.g.*, Henderson v. Shinseki, 131 S. Ct. 1197, 1199 (2011) (describing the

Gardner's Presumption simply required that veterans' benefits statutes be liberally construed, then balance could be restored and veterans' interests as a group could be considered. Admittedly, a liberal-construction approach may raise similar concerns: how liberal must the interpretation be to survive a challenge? However, the change to a liberal construction canon would be an improvement because, as currently formulated, *Gardner*'s Presumption directs that only one interpretation is correct—the most veteran-friendly interpretation. Whereas reformulated, *Gardner*'s Presumption would allow more than one interpretation to be acceptable.

Veterans' benefits statutes should be construed liberally, as all remedial statutes should. Thus, *Gardner*'s Presumption should be returned to its humble beginnings when *Boone*'s interpretive canon directed courts to construe veterans' benefits statutes liberally to protect those individuals who dropped their own affairs to fight for our nation.[401] *Gardner*'s Presumption should re-morph to its original form.

B. Gardner*'s Presumption Should Only Apply to Veterans' Benefits Statutes*

Regardless of whether the courts return *Gardner*'s Presumption to its liberal construction beginnings, *Gardner*'s application must be curtailed. Courts should apply *Gardner*'s Presumption only when the statute is truly a veterans' benefits statute. *Gardner*'s Presumption is simply inappropriate for resolving ambiguity in generally applicable statutes, because it makes no sense to allow veterans to interpret statutes that apply outside of the veterans' arena. Such a limit already applies in the context of *Chevron*: when an agency interprets a generally applicable statute, such as the tax code or the Administrative Procedures Act, *Chevron* does not apply.[402]

This limitation has appeared in the Federal Circuit's cases. For example, the VA raised this issue during the appeal of *Bazalo v. Brown*.[403] In that case, the VA interpreted the EAJA,[404] a generally applicable statute that applies to litigants besides veterans.[405] The issue in *Bazalo* was whether the veteran had to submit proof of his net worth within a thirty-day filing

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current preference in favor of the veteran in review of VA decisions).

401. Boone v. Lightner, 319 U.S. 561, 575 (1943). Or, as Justice Douglas noted in a later case, "[b]ut as we indicated on another occasion, the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call." Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

402. *See* Jellum, Chevron*'s Step Zero*, *supra* note 189 at 84–85.

403. 9 Vet. App. 304 (1996), *rev'd sub nom.* Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998). The EAJA allows parties, including veterans, to receive attorneys' fees and expenses when they prevail in litigation against the government, so long as they meet certain requirements. *See supra* note 126 and accompanying text.

404. 28 U.S.C. § 2412 (1991).

405. 9 Vet. App. at 308-09 (noting that the EAJA applies to the United States agencies and officials).

window.[406] The Veterans Court held that the veteran could not supplement the defective application after thirty days.[407] In its reasoning, the majority did not mention *Gardner*'s Presumption.[408]

When the veteran appealed the case to the Federal Circuit, the VA argued, among other things, that *Gardner*'s Presumption did not apply because the EAJA was not a *veterans*' benefits statute; rather, it was a generally applicable statute that applied to any party prevailing against the government.[409] Hence, the VA argued that the Presumption should not apply. The majority dodged the issue entirely stating that, "[i]n making this determination, we need not address whether the canon of construction that interpretive doubt be resolved in favor of a veteran should be applied."[410] In contrast to the majority, the dissent agreed with the VA: "[t]he EAJA is not a veterans' benefits statute, however. Rather, it is a statute of general applicability. The rule of statutory construction upon which [the veteran] relies does not apply in this case."[411] The dissent's approach is the correct one; *Gardner*'s Presumption should not apply to generally applicable statutes.

In a more recent case, the Veterans Court applied this limitation. In *Ramsey v. Nicholson*,[412] the veteran sought mandamus to compel the VA to hear his case. The VA Secretary had issued a memorandum staying a class of pending cases because the VA was appealing an adverse decision from the Veterans Court on the issue.[413] The relevant statute directed the VA to decide cases "in regular order according to [their] place upon the docket."[414] The veteran argued that this language required the VA to process cases in strict numerical order without granting any stays.[415] The court first rejected this narrow interpretation as absurd.[416] The court then acknowledged that *Gardner*'s Presumption was relevant "where a veterans' benefits statute is ambiguous."[417] But the court was not convinced that "the statute in question [was] a veterans' benefits statute rather than a

406. *Id.* at 306.
407. *Id.* at 311.
408. In contrast, the dissent referred to *Gardner*'s Presumption. *Id.* at 314–15 (Steinberg, J., concurring in part and dissenting in part) (stating that the majority opinion "contradicts the Supreme Court's recent charge that in construing a statute 'interpretive doubt is to be resolved in the veteran's favor.'" (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).
409. Bazalo v. West, 150 F.3d. 1380, 1383 (Fed. Cir. 1998).
410. *Id.* at 1383–84 n.1.
411. *Id.* at 1384 (Schall, C.J., dissenting).
412. 20 Vet. App. 16 (2006).
413. *Id.* at 20.
414. *Id.* at 29 (quoting 38 U.S.C. § 7107(a) (2006)).
415. *Id.*
416. *See id.* at 31 (describing the problematic scenarios that result from the veteran's proposed literal interpretation of the statute).
417. *Id.* at 35.

statute setting general guidance for fairness . . . ."[418] The court therefore concluded that *Gardner*'s Presumption did not apply.

Most recently, in *Henderson v. Shinseki*,[419] the Federal Circuit failed to mention *Gardner*'s Presumption in a case involving a statute that was not a veterans' benefits statute.[420] While the statute at issue identified the time for filing a notice of appeal with the Veterans Court and, thus, applied only to veterans' cases, the statute did not provide any *benefits* to veterans. The issue for the Federal Circuit was whether the statute was subject to equitable tolling.[421] The court held that the statute could not be tolled but never mentioned *Gardner*'s Presumption.[422] Why the court failed to mention *Gardner*'s Presumption is unclear, but it is possible that the court ignored the Presumption because the statute at issue was not a veterans' *benefits* statute. Notably, *Chevron* did not apply.

Candidly, the Supreme Court has ignored the distinction between a veterans' *benefits* statute and a veterans' statute. The Court reversed the Federal Circuit's holding in *Henderson* and cited *Gardner*'s Presumption to support its pro-veteran decision.[423] The Court's opinion suggests that it applies *Gardner*'s Presumption to *all* veterans' statutes regardless of whether they are veterans' *benefits* statutes. Perhaps the Court should reconsider this conclusion, but at a minimum, *Gardner*'s Presumption should not apply to generally applicable statutes like the EAJA.

Hence, even if *Gardner*'s Presumption is an appropriate canon for judges to use when interpreting statutes, courts should not use the Presumption when the statute at issue is not a veterans' statute, such as one meant to provide review of VA decisions. The Presumption is also inappropriate when the statute is not a veterans benefit statute meant to thank and honor veterans for their service. Certainly, veterans should play no role in interpreting generally applicable statutes.

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418. *Id.*
419. 589 F.3d 1201 (Fed. Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 1197 (2011).
420. *Id.*
421. *Id.* at 1203.
422. *See id.* at 1220. The majority did not mention *Gardner*'s Presumption, but the dissent did. Without addressing the issue of whether a statute that sets an appeal deadline is a veterans' benefits statute, the dissent chastised the majority for ignoring *Gardner*'s Presumption:

> This court often pays lip-service to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." . . . In reality, however, it not infrequently fails in its "fundamental obligation to apply the law, when the issue is an open one, in favor of the veteran." Even if this were a close case, which it is not, we would be obliged to resolve any interpretive doubt regarding whether equitable tolling applies to section 7266 in the veteran's favor.

Id. at 1232 (Mayer, J., dissenting) (citations omitted).
423. *See* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) (stating that the VA is required to give veterans the benefit of any doubt when reviewing evidence regarding the veteran's claim).

C. Gardner*'s Presumption When* Chevron *Applies*

Gardner's application should be curtailed in another way as well. *Gardner*'s Presumption, as currently formulated, should not apply when *Chevron* applies because *Chevron*'s second step and *Gardner*'s Presumption directly collide. Alternatively, if *Gardner*'s Presumption were to re-morph into a liberal construction canon, then it should apply at *Chevron*'s first step, as all liberal construction canons do, rather than at *Chevron*'s second step. Indeed, regardless of which form it takes, *Gardner*'s Presumption is simply inapplicable during *Chevron*'s second step. This section addresses the conflict between *Chevron* and *Gardner*'s Presumption.

1. No application

In its super-strong formulation, *Gardner*'s Presumption should play no role in cases involving VA interpretations entitled to *Chevron* deference for two reasons. First, this resolution is consistent with the Supreme Court's jurisprudence related to both *Gardner*'s Presumption and *Chevron*. Second, *Gardner*'s Presumption invites courts to let their view of what is most beneficial to veterans trump the view of the expert agency, the VA.

First, a resolution precluding the Presumption from applying in cases that involve VA interpretations entitled to *Chevron* deference is consistent with the Supreme Court's jurisprudence related to *Gardner*'s Presumption. Importantly, neither *Boone*, *Fishgold*, nor *King* involved an agency interpretation, and therefore, *Chevron* was not an issue in those cases.[424] Moreover, the Supreme Court has never directly addressed the conflict. While *Gardner* did involve an agency interpretation, the Court never reached *Chevron*'s second step because the statute was clear.[425] Rather, the Court simply noted that the interpreting regulation was inconsistent with the plain language of the statute—a holding consistent with *Chevron*'s first step—and stopped its analysis.[426] Admittedly, the Court indirectly addressed *Chevron*'s second step in a footnote.[427] In that footnote, the Court indicated that even if the statutory language were ambiguous, a finding consistent with *Chevron*'s second step, any "interpretive doubt [would] be resolved in the veteran's favor."[428] Yet, the dictum contained in

424. King v. St. Vincent's Hosp., 502 U.S. 215 (1991); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946); Boone v. Lightner, 319 U.S. 561 (1943).

425. As noted earlier, the first time the Court cites *Chevron* is toward the end of the opinion, when the Court quotes another case, *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993), which quotes *Chevron*. Brown v. Gardner, 513 U.S. 115, 120 (1994). Only in the very last paragraph does the Court cite *Chevron* for justification for the Court's refusal to defer. *Id.* at 122.

426. *Id.* at 118–19.

427. *Id.* at 118 n.2.

428. *Id.*

this footnote does not show either that the Court clearly understood the conflict between *Gardner*'s Presumption and *Chevron*'s second step or that the Court actually resolved that conflict. Rather, the footnote appears to be more of an afterthought, added as additional support for the Court's primary reasoning. Simply put, the Supreme Court to date has not directly addressed the question of whether *Gardner*'s Presumption should apply in the face of a reasonable, but contradictory, agency interpretation.

Second, if the Supreme Court were to actually address the issue, it should conclude that *Gardner*'s Presumption has no role in cases involving VA interpretations entitled to *Chevron* deference. According to *Chevron*, *agencies* have the power to interpret ambiguous statutes because of their expertise, because of Congress's implied delegation to them, and because they are politically accountable.[429] Applying *Chevron*'s delegation rationale to veterans law, the Court should note that Congress gives power to the VA to fill the interstices of the law; such power is given neither to veterans, nor to the courts.[430] If *Gardner*'s Presumption applied to cases in which *Chevron* also applied, then *Chevron* would no longer be about the reasonableness of the VA's interpretation. Rather, under the current version of *Gardner*'s Presumption, *Chevron* would become a question of which interpretation—the VA's or the veteran's—that the court thought was more favorable to the veteran. Because the veteran's interpretation will almost always be the most veteran-friendly, the power to fill interstices in the law would belong to veterans and the courts rather than to the experienced VA.

Notably, there would be less conflict if *Gardner*'s Presumption returned to its original formulation, although the conflict would not disappear completely. If courts were directed to broadly interpret ambiguous veterans' benefits statutes at some point in the *Chevron* analysis, the veteran's interpretive role would lessen but not disappear. In this scenario, the courts' role would be greater than currently envisioned under *Chevron*, for courts would have to determine which of two interpretations—the VA's or the veteran's—was the better interpretation. While this result is an improvement because the balance of interpretive power would not be in each veteran-litigant's hands, it is not ideal because the court would retain the balance of interpretive power. If *Gardner*'s Presumption plays a role when *Chevron* applies, it seems unlikely that a court would adopt the VA's reasonable interpretation.

Perhaps for this reason, the Federal Circuit cautioned that courts "must take care not to invalidate otherwise reasonable agency regulations simply

429. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44, 865–66 (1984).
430. *Id.* at 865.

because they do not provide for a pro-claimant outcome in every imaginable case."[431] In *Sears*, the Federal Circuit soundly rejected a veteran's argument that "ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans' benefits scheme overrides *Chevron* deference."[432] Similarly, in *Terry*, the Federal Circuit recognized *Gardner*'s Presumption as "a canon of statutory construction," but noted that it does not affect whether a regulation meets the requirements of *Chevron*.[433] In other words, courts should ignore *Gardner*'s Presumption when *Chevron* applies.

2. Chevron*'s first step*

Alternatively, assuming the statute in controversy is a veterans' benefits statute and that *Chevron* applies, then *Gardner*'s Presumption as re-morphed might be part of *Chevron*'s first step—determining whether Congress has directly spoken to the issue—not a trump to *Chevron*'s second step. If courts were to apply *Gardner*'s Presumption as currently formulated at *Chevron*'s first step, then courts might let their own view of what most helps a particular veteran trump the VA's view, which aims to benefit veterans as a group. But in its original form, *Gardner*'s Presumption was nothing more than a liberal construction canon in the context of a particular area of law.[434] Because veterans' benefits statutes are remedial,[435] courts applying *Chevron*'s first step could presume that Congress intended a liberal construction. Assuming that Congress prefers courts to interpret veterans' benefits statutes liberally, then applying this liberal construction canon during the analysis of *Chevron*'s first step makes sense. And assuming that the first step of *Chevron* requires a full statutory analysis with all "the traditional tools of statutory construction,"[436] then applying this liberal construction canon during the analysis of *Chevron*'s first step is consistent with courts' use of other remedial canons. Indeed, the Supreme Court and lower courts have applied remedial canons in this way in the past.[437] Thus, *Gardner*'s Presumption would no longer be an

431. Sears v. Principi, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003).

432. *Id.* at 1331. Unfortunately, the Federal Circuit did not explain how to resolve the tension between *Gardner*'s Presumption and *Chevron*'s second step.

433. Terry v. Principi, 340 F.3d 1378, 1384 (Fed. Cir. 2003) (citing Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001)).

434. *See supra* Part II.A (explaining the development of Gardner's Presumption as liberally construed).

435. *See supra* notes 57–59 and accompanying text.

436. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). *But see*, *Chevron*'s Demise, *supra* note 95, at 729 n.25 (arguing that Justice Scalia has successfully transformed *Chevron*'s first step from a full statutory construction inquiry into a textual inquire only).

437. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) (applying presumption

ace in the hole for veterans, but the concepts behind the Presumption and veterans law in general—which are pro-claimant and veteran-friendly—would still be furthered. Moreover, agency expertise would be retained.

While no court has directly applied this approach, the Federal Circuit came the closest in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*.[438] In that case, the court hinted that *Gardner*'s Presumption, in its present super-strong formation, should be part of *Chevron*'s first step. The court found the statute in that case to be ambiguous because the legislative history suggested one interpretation while *Gardner*'s Presumption suggested another.[439] Thus, although one of the traditional tools of interpretation, legislative history, directly supported the VA's interpretation, the Federal Circuit gave less weight to that history because of *Gardner*'s Presumption.[440]

Importantly, *Chevron* was not an issue in that case because the interpreting regulation was not issued through notice and comment procedures.[441] Yet, the court noted that if *Chevron* applied, the next step in the court's analysis would be to apply *Chevron*'s second step because the traditional tools of statutory interpretation pointed in opposite directions.[442] In saying that *Chevron* would be the next step, the court implied that *Gardner*'s Presumption should be part of *Chevron*'s first step. The court's approach is sound except for one point: if a court applies *Gardner*'s Presumption in its super-strong formulation at step one, then it is unlikely that the court would ever reach step two because the court would overwhelmingly find in favor of the veteran. If instead a court applies *Gardner*'s Presumption in its liberal-construction formulation at step one, then it is very possible that the court would still find a statute ambiguous despite applying the Presumption.

3. Chevron*'s second step*

While *Gardner*'s Presumption as re-morphed may be relevant to the inquiry under *Chevron*'s first step, it is never relevant at *Chevron*'s second step. When *Chevron*'s second step applies, courts should adopt any

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against retroactivity during *Chevron*'s first step); *see also* Kenneth Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L. J. 64, 77–78 (2008) (suggesting that a majority of courts apply such canons to eliminate statutory ambiguity at *Chevron*'s first step).

438. 260 F.3d 1365 (Fed. Cir. 2001).

439. *Id.* at 1377–78. The court noted that the canons of interpretation for resolving that ambiguity pointed in different directions. Specifically, the legislative history was relatively clear that the VA's interpretation was correct. *Id.* at 1377.

440. *Id.* at 1378 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).

441. *Id.* ("While the parties do not argue the point, the Supreme Court has held that *Chevron* deference does not normally apply to informal rulemakings.").

442. *Id*.

reasonable VA interpretation. In so doing, courts should presume that the VA—the expert agency charged with helping veterans—adopted the interpretation that is most helpful to veterans as a whole even if the veteran-litigant loses. Courts do not have the requisite expertise to identify that interpretation; that was one lesson from *Chevron*.[443] If courts apply *Gardner*'s Presumption in every case in which they find statutes ambiguous after applying step one of *Chevron*, then the veteran-litigant's interpretation will always control, unless it is absurd. Thus, each individual veteran would have the power to hijack the interpretive process from the VA.

A resolution to adopt any reasonable interpretation of the VA when applying *Chevron*'s second step is consistent with the later jurisprudence of both the Federal Circuit[444] and the Veterans Court.[445] Both of these courts ultimately concluded that when a court reaches *Chevron*'s second step, *Gardner*'s Presumption does not apply. For example, in the Federal Circuit's most recent case to address this issue, *Guerra v. Shinseki*,[446] the majority made clear that *Chevron*'s second step trumped *Gardner*'s Presumption.[447] In *Guerra*, the issue on appeal was whether the VA correctly interpreted a statute that provided for additional monthly compensation to severely-disabled veterans.[448] The statute provided significant additional compensation to veterans who had a particular disability rated at 100% (a "total disability") if that veteran also had "another independently rated disability or combination of disabilities rated at 60%, or was permanently housebound by reason of service-connected disability."[449] The veteran in the case had multiple service-connected

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443. In *Chevron*, the Court noted the importance of agency expertise, reasoning that "judges are not experts," at least not in these technical areas. *Chevron*, 467 U.S. at 865. In contrast, agency personnel are highly qualified to make technical determinations and are charged with making such determinations. *Id.* Thus, it simply makes sense to defer to such expertise. *Id.* This justification was not new. Two earlier cases had also referred to this rationale. *See* NLRB v. Hearst Publ'ns., Inc., 322 U.S. 111, 130–31 (1944) (commenting that administrators had the benefit of "[e]veryday experience in the administration of the statute" which "gives it familiarity with the circumstances and backgrounds of employment relationships"); Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) (opining that the agency administrator had "accumulated a considerable experience in the problems" that the agency faced).

444. *E.g.*, Sears v. Principi, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003) (cautioning that courts "must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case."); *accord* Terry v. Principi, 340 F.3d 1378, 1384 (Fed. Cir. 2003); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001).

445. *See generally* Haas v. Nicholson, 20 Vet. App. 257, 269 n.4 (2006), *rev'd sub nom.* Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).

446. 642 F.3d 1046 (Fed. Cir. 2011).

447. *Id.* at 1049.

448. *Id.* at 1047.

449. *Id.* at 1050. The statute provides that a veteran shall receive special monthly compensation: "If the veteran has a service-connected disability rated as total, and (1) has

disabilities that when combined exceeded a rating of 100%, but none of those disabilities individually rated at 100%.[450] The veteran argued that additional compensation should be available to any veteran who was totally disabled, regardless of whether the veteran had a single disability rated at 100% or had multiple disability ratings that combined to 100%.[451] The Veterans Court disagreed, and pursuant to *Chevron*'s first step, found the text of the statute clear: the veteran did not meet the threshold requirement for special monthly compensation of "a service-connected disability rated as total" because none of his disabilities independently rated as 100%.[452]

A majority of the Federal Circuit agreed, looking to the statute's use of the singular "a" before "service-connected disability."[453] However, the majority acknowledged that the statute "[was] not entirely free from ambiguity," so the court felt "compelled" to defer to the VA's interpretation pursuant to *Chevron*'s second step.[454] Because the VA had promulgated a regulation interpreting the statute to require "a *single* service-connected disability rated as 100 percent," the veteran's interpretation failed.[455] The majority noted that it had previously rejected "the argument that the pro-veteran canon of construction [*Gardner*'s Presumption] overrides the deference due to the VA's reasonable interpretation of an ambiguous statute."[456] Thus, the majority found the statute ambiguous and adopted the VA's reasonable interpretation pursuant to *Chevron*; consequently, *Gardner*'s Presumption was simply inapplicable.[457]

In contrast, the dissent found *Chevron* inapplicable and asserted that the majority should have turned to *Gardner*'s Presumption rather than to *Chevron*'s second step once it had found ambiguity. Pursuant to this approach, veterans would always resolve any interpretive doubt or ambiguity in a veterans' benefits statute. Yet, the dissent's approach is surely wrong. When courts turn to *Chevron*'s second step to interpret ambiguous statutes, *Gardner*'s Presumption should be irrelevant. When the VA has reasonably interpreted statutes using force of law procedures, the interpretations are entitled to *Chevron* deference because the VA has the power to interpret ambiguous statutes, not veterans.

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additional service-connected disability or disabilities independently ratable at 60 percent or more, or, (2) by reason of such veteran's service-connected disability or disabilities, is permanently housebound." 38 U.S.C. 1114(s) (2006).

450. *Guerra*, 642 F.3d at 1048.
451. *Id.* at 1048.
452. *Id.* (referencing 38 U.S.C. 1114(s) (2006)).
453. *Id.* at 1049.
454. *Id.*
455. *Id.* (quoting 38 C.F.R. § 3.350(i) (2009) (emphasis added)).
456. *Id.* at 1051 (citing Sears v. Principi, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003)).
457. *Id.* at 1049.

D. Gardner*'s Presumption When* Chevron *Does Not Apply*

If the statute in controversy is a veterans' benefits statute and if *Chevron* does not apply, then *Gardner*'s Presumption, preferably as re-morphed, should apply. *Gardner*'s Presumption applies in those cases in which the VA either has not acted or has not acted in a way that would entitle it to *Chevron* deference. In the context of VA interpretations, *Chevron* deference is inapplicable in three situations: (1) when the litigation involves private parties and there is no relevant VA regulation; (2) when the VA has not interpreted the statute prior to the litigation; and (3) when the VA is not entitled to *Chevron* deference for its interpretation of a statute.[458]

First, for those cases involving private litigants, such as an employer and the veteran, *Gardner*'s Presumption is a fair tiebreaker, assuming the VA has not promulgated a regulation or acted via formal adjudication to interpret the statute. The purpose of veterans' statutes in general is to thank veterans for their service and help them assimilate back into society;[459] hence, interpreting a veterans' statute to benefit veterans rather than employers, other private litigants, or governments, makes sense as a statutory interpretation approach. Such an approach is also consistent with the remedial construction canon. For example, if Congress had to choose between inconveniencing employers by requiring them to keep the jobs of service personnel available or inconveniencing veterans who had to leave a job to fight a war, Congress likely would choose to protect veterans' job security. These are, perhaps, the easy cases.

Second, however, when the litigation is not between the veteran and a private or government party, but rather between the veteran and the VA; then, the answer is less simple. When the VA has not interpreted a statute prior to the litigation, then *Gardner*'s Presumption may be a fair tiebreaker. For example, in *Robinette v. Brown*,[460] the Veterans Court reviewed a VA decision denying a veteran entitlement to service-connected benefits for diabetes.[461] The veteran's service records had been destroyed in a fire.[462] To establish that his military service caused his diabetes, the veteran offered his written recollection of what his physician had told him.[463] The issue for the court was whether the VA was obligated to advise the veteran as to what evidence was necessary for his application to be complete.[464] The relevant statute provided that "[i]f a claimant's application for benefits

458. *See* discussion *supra* Part II.C.
459. *See supra* Part II.B.
460. 8 Vet. App. 69 (1995).
461. *Id.* at 71.
462. *Id.*
463. *Id.* at 71, 73.
464. *Id.* at 77.

under the laws administered by the Secretary is *incomplete*, the Secretary shall notify the claimant of the *evidence necessary to complete* the application."[465] The VA argued that it need only help veterans complete the claim form, not help them identify necessary evidence.[466] The court rejected this argument as contrary to the plain meaning of the text.[467] In so doing, the court referred to *Gardner*'s Presumption and rejected the VA's "quite narrow" interpretation.[468] In this case, the VA had not, prior to the litigation, interpreted the statute in a way that deserved *Chevron* deference.[469] Rather, the VA had interpreted the statute during the litigation or during the events leading up to the litigation.[470] In this situation, the court's decision to turn to *Gardner*'s Presumption makes sense because there was no carefully considered agency interpretation entitled to deference. Rather, the VA offered its position for the first time in response to litigation without using force of law procedures. The deliberateness and carefulness of the VA's interpretation might be suspect if developed informally in response to pending litigation; hence, it should not receive strong deference.

Third, even when the VA interprets a statute prior to the ensuing litigation but does so without using force of law procedures, then *Gardner*'s Presumption may be a fair tiebreaker.[471] Agencies interpret statutes regularly and in varied ways, with more or less procedural formality and deliberation. For example, an agency might interpret a statute as part of a notice and comment rulemaking process, like the Environmental Protection Agency did in *Chevron*.[472] Similarly, an agency might interpret a statute during a formal adjudication. In contrast, an agency might interpret a statute when drafting an internal policy manual or when writing a letter to a regulated entity.[473] With the first two processes, Congress gave the agency the authority to issue interpretations that carry "force of law," and the agency used that authority to issue the particular

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465. *Id.* (quoting 38 U.S.C. 5103(a) (1994) (emphasis added)).
466. *Id.*
467. *Id.* at 78.
468. *Id.* at 77.
469. *Id.*
470. *See id.* at 78–79 (describing the Secretary's interpretation of the statute in the context of litigation).
471. For a detailed discussion of when *Skidmore* deference is appropriate and when *Chevron* deference is appropriate, *see* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207 (2006) (exploring the disagreement between Justices Scalia and Breyer regarding *Chevron*'s first step); Lisa Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1486 (2005) (criticizing the Supreme Court's jurisprudence in this area); Jellum *supra* note 281, at 86–98.
472. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).
473. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (interpreting a statute in a bulletin); Christensen v. Harris Cnty., 529 U.S. 576 (2000) (interpreting a statute in response to a letter inquiry from the county).

interpretation.[474] For this reason, these processes are considered more formal, or procedurally prescribed, while the latter processes are less formal, or less procedurally prescribed.[475] According to three Supreme Court cases decided a decade ago, *Chevron* deference is appropriate (1) when Congress delegates relatively formal procedures that the agency uses, or (2) when Congress provides other evidence that it intended courts to defer to the agency interpretation.[476] In all other situations, a different level of deference applies: *Skidmore* deference.[477] According to *Skidmore* deference, courts should consider whether the agency's interpretation was persuasive, taking into account "all those factors which give [the agency interpretation] power to persuade, if lacking power to control."[478] This "power-to-persuade" test involves a balancing of three factors: (1) the consistency of the agency's interpretation; (2) the thoroughness of the agency's consideration; and, (3) the soundness of the agency's reasoning.[479] A court could consider *Gardner*'s Presumption as one part of its analysis regarding whether the VA's reasoning was persuasive under *Skidmore* analysis.

The Veterans Court adopted a similar, although less clearly stated, approach in *Osman v. Peake*.[480] In that case, the court noted that *Skidmore* deference was the appropriate standard for reviewing a VA General Counsel opinion that interpreted a statute.[481] The issue in *Osman* was whether the son of two permanently-disabled veterans was entitled to one dependent educational benefit or whether he was entitled to two separate awards based on each parent's disability.[482] The text of the relevant statute provided that "[e]ach eligible person shall . . . be entitled to receive educational assistance."[483] "Person" in the statute was defined as a "child of a person who, as a result of qualifying service . . . has a total disability permanent in nature resulting from a service-connected disability."[484] The VA General Counsel had, prior to the case, issued a "precedent opinion"

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474. *Mead*, 533 U.S. at 231–33.
475. *See, e.g.*, Bressman, *supra* note 471, at 1447 (questioning "whether *Chevron* deference applies to interpretations issued through informal procedures").
476. As some have noted:

> [After] *Christensen*, *Mead*, and *Barnhart*, the real question is Congress's (implied) instructions *in the particular statutory scheme*. The grant of authority to act with the force of law is a sufficient but not necessary condition for a court to find that Congress has granted an agency the power to interpret ambiguous statutory terms.

Sunstein, *supra* note 471, at 218.
477. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
478. *Id.* at 140.
479. *Id.*
480. 22 Vet. App. 252 (2008).
481. *Id.* at 256.
482. *Id.* at 253.
483. *Id.* at 255 (quoting 38 U.S.C. § 3510 (2006)).
484. *Id.* (quoting 38 U.S.C. § 3501 (a)(1)(A)(i-ii) (2006)).

interpreting the statute to prohibit dual awards.[485] VA General Counsel precedential opinions are binding on the VA; hence, the VA denied the son's request for benefits based on his mother's disability because the son had already received benefits based on his father's disability.[486]

The Veterans Court reversed the VA's denial.[487] Applying *Skidmore*, the court noted that it would defer to the VA interpretation to the extent the interpretation was persuasive because "such opinions do constitute a body of experience and informed judgment."[488] After reviewing the statutory language and rejecting the VA's interpretation, the court cited *Gardner*'s Presumption in noting that "[e]ven if the question . . . were a close one, the Court is bound to find [for the veteran's son]."[489] After finding the VA interpretation unpersuasive and inconsistent with the statutory language, the court rejected the VA's interpretation entirely.[490]

Similarly, in *Sharp v. Shinseki*[491] the Veterans Court turned to *Gardner*'s Presumption after first finding that *Skidmore*, rather than *Chevron*, applied.[492] After exhaustively and unsuccessfully reviewing the text and legislative history of the statutes at issue,[493] the court did not find the VA's

485. *Id.* at 256 (quoting Gen. Coun. Prec. 1-2002, at 1).
486. *Id.* at 256–57 (citing 38 U.S.C. § 7104(c) (2006)).
487. *Id.* at 261.
488. *Id.* at 256.
489. *Id.* at 259 (citations omitted).
490. *Id.* at 256–60; *accord* Hornick v. Shinseki, 24 Vet. App. 50, 53 (2010) (applying *Skidmore* deference to review the VA's interpretation contained in a general counsel precedent opinion).
491. 23 Vet. App. 267 (2009).
492. *Id.* at 275. The facts of the case are complicated, but can be found in Jellum, Chevron*'s Step Zero?*, *supra* note 189. Importantly, although the VA had promulgated two regulations that both related to the issue, *Chevron* did not apply because in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court held that when regulations merely parrot statutory language, *Chevron* is inappropriate. Sharp v. Shinseki, 23 Vet. App. 267, 275 (2009). Here, the Veterans Court found that the implementing regulations parroted the underlying statutory language. *Id.* at 274–75. Thus, *Skidmore* rather than *Chevron*, applied. *Id.* at 275.
493. The court noted that the text of that section was silent regarding how the effective date for such additional compensation should be determined. 23 Vet. App. at 272. In the face of this silence, the court turned to the legislative history of this statute. According to the court, the legislative history suggested that the purpose of the statute was to "defray the costs of supporting the veteran's . . . dependents when a service-connected disability is of a certain level hindering the veteran's employment abilities." *Id.* (quoting S. REP. NO. 95-1054, at 19 (1978)). While this purpose might favor a broad interpretation of § 1115 generally, the legislative history did not specifically identify the effective date that should apply to additional compensation claims under § 1115:

> The limited legislative history enlightens the Court as to the purpose of providing additional compensation for dependents, but such history does not assist the Court in determining whether Congress intended additional compensation for dependents under section 1115 to be on (1) *only the first* rating decision meeting statutory criteria of section 1115 or (2) *any* rating decision meeting the statutory criteria.

Id.

Finding the legislative history unenlightening, the court returned to the text and concluded that entitlement to § 1115 benefits should accrue whenever the statutory factors were met.

interpretation persuasive because "the Secretary ha[d] offered no support for his position."[494] To resolve the ambiguity, the court turned to *Gardner*'s Presumption and stated that *Gardner* required an "expansive reading of the statute."[495] Finding the veteran's interpretation to be more favorable to veterans, the court reversed the VA's determination.[496]

In the same way, the Federal Circuit has applied *Gardner*'s Presumption when *Chevron* did not apply. In *Sursely*, the court reversed a Veterans Court's opinion affirming the VA's decision to refuse a veteran's request for two separate clothing allowances.[497] The facts of the case were stated earlier:[498] the Veterans Court affirmed the VA's denial of the second claim based on the fact that the relevant statute was clear because it used the singular, reading "shall pay *a* clothing allowance."[499] The Federal Circuit reversed.[500] Because the Veteran Court's contrary interpretation suggested ambiguity, the Federal Circuit reviewed the enactment history[501] and mentioned *Gardner*'s Presumption.[502] Specifically, the court noted that in the face of statutory ambiguity, it had to apply *Gardner*'s Presumption.[503] Importantly, the court noted in a footnote that because *Chevron* was inapplicable, the court could consider *Gardner*'s Presumption.[504]

Thus, while *Gardner*'s Presumption should have limited or no application when the VA has interpreted a statute in a manner entitling that interpretation to *Chevron* deference, *Gardner*'s Presumption is appropriate when *Chevron* does not apply. Even if courts apply *Gardner*'s Presumption to this narrow group of cases, however, courts should apply the Presumption to veterans' benefits statutes only and not to generally applicable statutes. Moreover, courts should return *Gardner*'s Presumption

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Id. In other words, although the statute did not explicitly so provide, the court concluded that whenever a veteran met § 1115's criteria, the veteran's dependents were impliedly entitled to additional compensation. *Id.*

494. *Id.* at 275.

495. *Id.* at 275–76 (citing Sursely v. Peake, 551 F.3d 1352, 1357 (Fed. Cir. 2009)).

496. *Id.* at 277.

497. 551 F.3d at 1353.

498. *See supra* notes 274–286.

499. *See* Sursely v. Peake, 22 Vet. App. 21, 22, 25–26 (2007) (referring to 38 U.S.C. §1162 (2003) (emphasis added)), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009).

500. *Sursely*, 551 F.3d at 1353.

501. As to the enactment history, originally, the statute had permitted clothing allowances for individuals using "a prosthetic or orthopedic appliance or *appliances*." *Id.* at 1356 (quoting Veterans' Compensation and Relief Act of 1972, Pub. L. No. 92-328, § 103, 86 Stat. 393, 394 (1972)). In 1989, Congress amended the statute to delete the word "appliances" and to insert the singular: "appliance." *Id.* at 1357. According to the court, this extrinsic evidence—the amendment—showed that Congress intended "to provide additional benefits for those veterans . . . who use multiple orthopedic appliances." *Id.*

502. *Id.* at 1355.

503. *Id.* at 1357.

504. *Id.* at 1357 n.5 ("[W]e need not consider the applicability of *Sears v. Principi*, . . . which properly urges caution when considering the meaning of a statute in light of both *Brown* and *Chevron*.").

to its childhood formulation: it was only ever meant to encourage courts and the VA to interpret veterans' benefits statutes liberally to thank veterans for their sacrifice and help them return to society smoothly. *Gardner*'s Presumption has since morphed well beyond its humble beginnings.

E. Gardner*'s Presumption Belongs to the VA, Not to the Court*

A final alternative, and perhaps the best way to resolve the tension between *Gardner*'s Presumption and *Chevron* would be to view the direction that "interpretive doubt is to be resolved in the veteran's favor"[505] as a duty belonging to the VA and not as an interpretive tool belonging to the courts. Admittedly, this resolution is contrary to the Presumption as currently formulated. Yet, this resolution would work. The VA would have to provide adequate written reasons for its findings and conclusions of law and fact so that the veteran claimant can understand the basis for the VA's decision and so that the Veterans Court can review that decision.[506] In these findings, the VA could be required to include information regarding whether it considered *Gardner*'s Presumption during its decision-making process. The courts could then evaluate whether the VA met its duty when the courts apply either the second step of *Chevron* or *Skidmore*. In other words, one test of the reasonableness or persuasiveness of the VA's interpretation would be whether the VA took *Gardner*'s Presumption into account.

This approach would place the duty of finding a reasonable interpretation that most favors veterans as a whole on the shoulders of the agency charged with helping veterans. Given that the veteran-claimant will always be seeking benefits that the VA has denied, this duty would, at least where both the VA and veteran have proffered "reasonable" interpretations, require the VA to explain why its preferred interpretation better serves veterans as a group (for example, because of the number of individuals affected) as opposed to the veteran's interpretation. As such, the approach melds the best of the current approach—namely favoring veterans—with the best of the alternatives—including the VA's expertise in the interpretation process.

The Veterans Court actually suggested this approach in *Cottle v. Principi*.[507] In that case, the VA General Counsel acknowledged that a statute could be read broadly to cover the veteran's injury but admitted

505. Brown v. Gardner, 513 U.S. 115, 118 (1994).
506. *See* Allday v. Brown, 7 Vet. App. 517, 527 (1995) (explaining the information that the Board of Veterans' Appeals must provide to enable a claimant to understand its decision and for a court to review the decision).
507. 14 Vet. App. 329 (2001).

choosing to interpret the statute narrowly in her Precedent Opinion.[508] The court rejected her interpretation and chastised her for "fail[ing] to discuss or consider *Gardner* at all."[509] The court stressed that *Gardner*'s Presumption required the VA to "resolv[e] any interpretative doubt in favor of the veteran."[510] While not exactly correct, the court's suggestion supports the feasibility of this approach.

The Veterans Court has toyed with this approach in other cases as well. For example, in *Smith v. Nicholson*,[511] the court chided the VA for failing to consider *Gardner*'s Presumption.[512] Similarly, Judge Kasold's dissent in *Ross v. Peake*[513] chastised the VA for failing to consider and discuss *Gardner*'s Presumption.[514] Finally, in *Jones v. Principi*,[515] the Veterans Court remanded the case, specifically directing the VA to evaluate the role that *Gardner*'s Presumption should play in the VA's decision.[516]

While placing the duty on the VA rather than leaving the Presumption to the courts to interpret statutes in favor of veterans might alleviate some of the conflict, it may not eliminate the conflict completely. If courts at *Chevron*'s second step consider whether the VA considered *Gardner*'s Presumption when it interpreted a statute, then it is unclear whether an interpretation that does not favor a particular veteran-litigant would be veteran-friendly enough to be considered reasonable. Thus, placing the burden on the VA may not completely eliminate the conflict between *Gardner*'s Presumption and *Chevron*, but it would be an improvement over the conflict in place today.

CONCLUSION

Gardner's Presumption morphed from a simple directive to courts to construe veterans' benefits statutes liberally into a veterans' trump card in which the VA always loses the interpretive battle. Today, *Gardner*'s Presumption is a canon of interpretation that directs courts to resolve interpretive doubt in a veteran's favor. Yet, *Gardner*'s Presumption directly conflicts with *Chevron*, which directs courts to adopt an agency's reasonable interpretation of an ambiguous statute. The Veterans Court and Federal Circuit have struggled unsuccessfully to resolve this conflict, while the Supreme Court has never directly addressed it. Yet the two doctrines

508. *Id.* at 336.
509. *Id.*
510. *Id.*
511. 19 Vet. App. 63 (2005), *rev'd in part*, 451 F.3d 1344 (Fed. Cir. 2006).
512. *See id.* at 73.
513. 21 Vet. App. 534, 536–37 (2008) (Kasold, J., dissenting) (denial of rehearing en banc).
514. *See id.* at 536.
515. 16 Vet. App. 219 (2002).
516. *Id.* at 226–27.

simply cannot coexist harmoniously as currently formulated. Either the VA has the power to interpret ambiguous statutes pursuant to *Chevron*'s second step, or veterans have the power to interpret ambiguous statutes pursuant to *Gardner*'s Presumption. If guidance from the Supreme Court is not forthcoming soon, the lower courts will have to resolve this issue themselves.[517]

This article explores the conflict and offers three ways for the lower courts to resolve the tension. First, regardless of which resolution is ultimately selected, *Gardner*'s Presumption should return to its humble beginnings. *Gardner*'s Presumption began as a liberal construction canon, similar to the remedial statutes interpretive canon. Rather than require courts to interpret all ambiguous statutes to favor veteran-litigants, the precursor to *Gardner*'s Presumption merely directed courts to construe ambiguous veterans' statutes liberally. Simply returning *Gardner*'s Presumption to its humble beginnings would eliminate most of the conflict between *Gardner*'s Presumption and *Chevron*.

Second, the courts should apply *Gardner*'s Presumption in very limited situations. Specifically, courts should apply *Gardner*'s Presumption only when the statute at issue addresses veterans' benefits, or at least veterans, and only when the VA has not already interpreted the statute in a way that entitles the VA to *Chevron* deference. Possibly, *Gardner*'s Presumption, as re-morphed, might play a role in *Chevron*'s first step; however, it should have absolutely no role in *Chevron*'s second step.

Third, and alternatively, *Gardner*'s Presumption could be viewed as a duty belonging to the VA rather than as an interpretive canon to be applied by the courts. With this approach, whether the VA considered *Gardner*'s Presumption, whatever its formulation, in interpreting a statute would be just one factor for a court to consider when applying either *Chevron*'s second step or *Skidmore* deference. This resolution is appropriate because it returns interpretive power to the VA while constraining the VA's interpretive choices. If the VA were unable to explain why a particular interpretation would be most beneficial to veterans as a whole, then the VA's interpretation would be neither reasonable under *Chevron*, nor persuasive under *Skidmore*. While this resolution makes the most sense, it is admittedly not in concert with the Supreme Court's jurisprudence in this area. Thus, the Veterans Court and Federal Circuit may feel compelled not to adopt this appealing approach.

In sum, there is no perfect resolution to this conflict, but there are a few workable alternatives. The time has come for the lower courts to resolve

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517. *See* DeBeaord v. Principi, 18 Vet. App. 357, 368 (2004) (noting that guidance from the Supreme Court is necessary to resolve the issue).

this conflict by offering concrete and consistent direction for those litigating veterans' cases, as the Supreme Court appears unlikely to offer guidance anytime soon.