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

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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’S
SECOND STEP

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ABSTRACT

In its landmark decision, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467
U.S. 837 (1984), the United States Supreme Court altered the interpretive power balance. Prior to
Chevron, courts determined the meaning of ambiguous regulatory statutes; after Chevron, agencies
determined the meaning of ambiguous regulatory statutes. Yet this simple truism does not hold within
veterans law. Within veterans law, there is a third player who plays an interpretive role: the veteran. The
veteran plays an interpretive role because of an unusual presumption identified in Brown v. Gardner, 513
U.S. 115 (1994). In Gardner, the Supreme Court directed courts to resolve interpretive doubt in
ambiguous statutes in favor of the veterans. This presumption, Gardner’s Presumption, is legend in
veteran’s jurisprudence; it is raised often by veteran litigants and their counsel, it is cited frequently by the
United States Court of Appeals for Veterans Claims, by the Federal Circuit, and, even occasionally, by
the Supreme Court.

Yet Gardner’s Presumption conflicts directly with Chevron’s second step. In Chevron, the
Supreme Court directed courts to defer to reasonable agency interpretations of ambiguous statutes.
Pursuant to Chevron’s first step, a court should determine “whether Congress has directly spoken to the
precise question at issue.” If Congress has not so spoken, then, under Chevron’s second step, a court
must accept any “reasonable,” agency interpretation. Yet Gardner’s Presumption directs that interpretive
doubt be resolved in veterans’ favor. Therein lies the conflict: Which 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 successfully; indeed, the Court of Appeals for

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Professors Cynthia Farina, Peter Strauss, Jack Beerman, William Funk, Russell Weaver, Richard Murphy, and William Araiza for their
contributions to my work in this field. The article is the third in a series of articles that resulted from my participation in the Twelfth Judicial
Conference of the United States Court of Appeals for Veterans Claims held in March 2010 in Washington D.C. I would like to thank the
organizers of the conference, Judge Davis and Judge Hagel, and especially, Professor Michael Allen, for inviting me to speak. I also thank
Mercer University School of Law for research and technological assistance. Finally, I would like to thank my research assistants, Troy Clark (JD,
2010) and Nick Phillips (JD expected 2012) for their outstanding and tireless help with the research for and editing of this paper.
Veterans Claims recently asked the Supreme Court for guidance on this very issue; yet, none has been forthcoming.

In this article, I answer that plea by exploring and resolving the conflict between *Chevron’s* second step and *Gardner’s* Presumption. In so doing, I identify how *Gardner’s* Presumption began as a liberal construction canon and morphed into the veterans’ trump card that it is today. I also explore how courts have used the presumption in the past and note the solutions that have been offered to date, none of which have proven satisfactory. Finally, I solve the conflict. 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 any reasonable 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.

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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 interpretive power balance. 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 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 veteran’s jurisprudence. It is raised often by veteran litigants and their counsel.\(^5\) Additionally, the presumption is cited frequently by the United States Court of Appeals for Veterans Claims (“Veterans Court”),\(^6\) by the Federal Circuit,\(^7\) and, even occasionally, by the Supreme Court.\(^8\) Yet *Gardner’s* Presumption conflicts directly with *Chevron’s* second step.

In *Chevron*, the Supreme Court directed courts to defer to reasonable agency interpretations of ambiguous statutes.\(^9\) Pursuant to *Chevron’s* first step, a court should determine “whether Congress has directly spoken to the precise question at issue.”\(^10\) If Congress has not so spoken, then, pursuant to *Chevron’s* second step, a court must accept any “permissible,” or “reasonable,” agency interpretation.\(^11\) Yet *Gardner’s* Presumption directs that any interpretive doubt—which the Veterans Court has equated with ambiguity—be resolved in a veteran’s favor.\(^12\) Therein lies the conflict: Which 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 asked the Supreme Court for guidance.\(^13\)

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3 This is my term, not the courts’ term.
4 Gardner, 513 U.S. at 118.
7 See, e.g., Nielsen v. Shinseki, 607 F.3d 802, 808 (Fed. Cir. 2010).
9 *Chevron*, 467 U.S. at 843-44.
10 “Chevron,” 467 U.S. at 843. 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.
11 *Id.* at 843-44. Deference to the agency under *Chevron’s* second step is much higher *Error! Bookmark not defined.*. 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 1995-96, agencies prevail at step one 42% of the time and at step two 89% 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. REG.* 1, 31 (1998).
12 Gardner, 513 U.S. at 117-18.
In this article, I answer that plea by exploring and resolving the conflict between *Chevron’s* second step and *Gardner’s* Presumption. In Part II, I identify how *Gardner’s* Presumption began as a liberal construction canon and morphed into the veterans’ trump card that it is today. In Part III, I examine the role that *Gardner’s* Presumption has played in the Veterans Court, the Federal Circuit, and the Supreme Court. 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 the conflict. Finally, in Part V, I offer a number of ways to resolve the conflict.

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 any reasonable 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 has become so legendary and misunderstood within veterans law requires an understanding of the development of the Veterans Court. Judicial review of the Department of Veterans’ Affairs (VA) decisions is very recent. Prior to 1988, VA benefit decisions were non-reviewable. Congress precluded review of such decisions in response to the financial pressures of the Great Depression—essentially, Congress opted to save money and resources by denying review. Not surprisingly, veterans disliked this system and fought for change. In 1988, Congress created the United States Court of Appeals for Veterans Claims (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.

The veterans law system differs from other adjudicatory schemes in two important ways. First, “the VA adjudication process is a nonadversarial one.” Congress specifically included a number of statutory advantages to veterans. For example, the VA Secretary is statutorily obligated to assist a veteran

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14 See section __ infra.
15 To do so, I have read and evaluated every case from the Veterans Court, Federal Circuit, and Supreme Court through March 2011 in which *Gardner’s* Presumption was mentioned. Error! Bookmark not defined.
16 See section __ infra.
17 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 . . . .”
20 Id.
Gardner’s Presumption

in developing the facts of his or her claim. Second, the pro se rate for veterans’ claims, roughly 80%, is the highest of any federal appellate court. These differences demonstrate that veterans law is veteran-friendly; this is a theme we will see repeatedly.

II. THE CREATION OF GARDNER’S PRESUMPTION

Another example of the veteran-friendly nature of veterans law is Gardner’s Presumption, which directs courts to interpret ambiguous statutes in favor of veterans. This section explores the development of Gardner’s Presumption from its humble beginnings as a liberal construction canon to its current formulation as tie-breaking trump card.

A. Gardner’s Precursor: Boone’s Interpretive Canon

Gardner’s Presumption (or rather its precursor) made its first appearance in 1943, in Boone v. Lightner. In Boone, a serviceman in the military was sued for an accounting. Prior to the trial, the serviceman requested a continuance under the Soldiers’ and Sailors’ Civil Relief Act until after he completed his call for duty. The trial judge denied the request. The serviceman lost the trial; the court ordered him to pay $11,000. Importantly, there was no agency interpretation at issue in this case—just two private parties disputing the meaning of a statute.

The serviceman appealed, arguing that the trial court should have granted his request for a continuance. 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 and to prepare a defense to the suit. At the conclusion of the Court’s analysis, however, the Court noted, without citing any authority and without explaining the import of its statement, that “the 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.”

22 38 U.S.C. § 1530A(a)(1) (2006); see also Walters v. Nat’tl Ass’n of Radiation Survivors, 473 U.S. 305, 323, 333-34 (1985) (indicating that the veteran “is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant’s burden of proof”).
25 Id. at 561-62. He was trustee of a trust fund. Id.
26 Id. at 563.
27 Id. at 564.
28 Id.
29 Id. at 564-65. That 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 (1940).
30 Id. at 564.
31 Id. at 572.
32 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).
interpretive canon would become the foundation for Gardner’s Presumption—which directs that veterans’ benefits statutes should be construed not just liberally, but in the veteran’s favor.\textsuperscript{33}

A few short years after Boone, the Court again referenced, without further explaining, Boone’s interpretive canon in Fishgold v. Sullivan Drydock & Repair Corp.\textsuperscript{34} 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.\textsuperscript{35} Again, there was no agency interpretation at issue in this case; just two private parties disputing the meaning of a statute.\textsuperscript{36} The Supreme Court adopted the employer’s interpretation, which allowed the employer to layoff the employee due to slowed working conditions.\textsuperscript{37} During its analysis, the Court said simply, “This 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.”\textsuperscript{38} The Court cited Boone but failed to elaborate or explain the interpretive canon at all.\textsuperscript{39} Also, as it had in Boone, the Court did not interpret the statute in the veteran’s favor despite the direction to construe veterans’ benefit statutes liberally.\textsuperscript{40}

Those familiar with statutory interpretation have likely already noted the similarity of Boone’s interpretive canon with an oft-repeated canon of interpretation that directs that remedial statutes should be construed liberally to further their “remedial” purposes.\textsuperscript{41} Boone’s interpretive canon is similar, if not identical, to the remedial interpretation canon likely because veterans’ benefits statutes are remedial.\textsuperscript{42} Remedial statutes are those statutes that correct (or remedy) existing statutes, create new rights, or expand remedies that were otherwise unavailable at common law.\textsuperscript{43} 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. For this reason, it is unclear whether the Court believed that liberal interpretation was appropriate simply because veterans’ benefits statutes are remedial in nature or for some other reason. However, in later cases, the Supreme Court has 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.\textsuperscript{44} Thus, liberally construing veterans’ benefits

\begin{itemize}
  \item Gardner, 513 U.S. at 117-18.
  \item 328 U.S. 275, 285 (1946).
  \item Id. at 280.
  \item Id. at 288 n.1 (quoting Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. Appendix, s 301 et seq., 50 U.S.C.A. Appendix, s 301 et seq.).
  \item Id. at 288.
  \item Id. at 285 (citing Boone, 319 U.S. at 575).
  \item See id. at 285.
  \item See id. at 288.
  \item Gardner’s Presumption [Vol. __:__
  \item Error! Bookmark not defined.. For example, in Babbitt v. Sweet Home Chapter of Communities 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 the common law. Id. at ___; see also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977); Voris v. Eikel, 346 U.S. 328, 333 (1953).
  \item Linda D. Jellum, Mastering Statutory Interpretation Error! Bookmark not defined., 251 (2008). But see Ober United Travel Agency, Inc v. U.S. Dept 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.”).
  \item Hoover v. Bernalillo Cnty. Assessor, 472 U.S. 612, 626 n.3 (1985) (Stevens, J., dissenting). In Hoover, Justice Stevens noted:
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.

B. Boone’s Morph

While Boone’s interpretive canon simply directed courts to construe veterans’ benefits statutes liberally, the Court transformed Boone’s interpretive canon from a liberal construction canon to a trump card 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. St. Vincent’s Hospital. 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 civilian reemployment. The reservist’s employer refused the reservist’s request for a three year leave of absence, claiming the length of time was unreasonable.

As was true in Boone and Fishgold, this lawsuit did not involve an agency’s interpretation of a statute. Rather, the reservist’s employer sought a declaratory judgment that the statute should be read to include a reasonableness limitation to protect employers generally from the burdens of holding job positions open indefinitely.

The justification for providing a special benefit for veterans, as opposed to nonveterans, has been recognized throughout the history of our country. It merits restatement. First, the simple interest in expressing the majority’s gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation. Second, recognition of the fact that military service typically disrupts the normal progress of civilian employment justifies additional tangible benefits—employment preferences, educational opportunities, subsidized loans, tax exemptions, or cash bonuses—to help overcome the adverse consequences of service and to facilitate the reentry into civilian society. A policy of providing special benefits for veterans’ past contributions has “always been deemed to be legitimate.”

See also Regan v. Taxation With Representation, 461 U.S. 540, 551-52 (1983). In Regan the Court said:

It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans’ organizations. Veterans have “been obliged to drop their own affairs and take up the burdens of the nation,” [Boone, 319 U.S. at 575], “subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.” Johnson v. Robinson, 415 U.S. 361, 380 (1974). Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has “always been deemed to be legitimate.” Personnel Administrator v. Feeney, 442 U.S. 256, 279 n.25 (1979).

Regan, 461 U.S. at 551-52.

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)).

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
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: “[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.” 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. But Fishgold did not support the Court’s assertion. In Fishgold (and Boone), the Court had suggested 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. In contrast, in King, the Court changed Boone’s interpretive canon from a liberal construction canon into a presumption requiring courts to construe such statutes “in the [veterans’] favor.” 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. Boone’s morph thus started as dictum in a footnote in King.

Had the Court simply created and then transformed Boone’s interpretive canon and stopped, there would be little to discuss in this paper. 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. Up 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. No agency interpretations were involved because VA benefit decisions were not renewable. 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 creation of judicial review of VA decisions in 1988 and the arrival of Chevron deference in 1984, the landscape changed.

C. Chevron Deference

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., the Supreme Court developed its famous two-step for courts to use when evaluating an agency’s interpretation of a statute. The facts of the case are well-known and need not be repeated here. The issue for the Court was
whether the Environmental Protection Agency’s interpretation of specific language in the Clean Air Act was valid.\footnote{Id. at 852.} The Court upheld the agency’s interpretation, creating the two-step deference framework.\footnote{Id. at 842.} Under the first step, a court should determine “whether Congress has directly spoken to the precise question at issue.”\footnote{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.} When applying this first step, courts should not defer to agencies at all. Rather, “[t]he judiciary is the final authority on issues of statutory construction….”\footnote{Id.} 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.\footnote{Id. at 866.} 

Chevron’s two-step 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 field; judges are not.\footnote{Id. at 865.} Congress entrusts agencies to implement law in a particular area because of this expertise. Scientists and analysts working for the Food and Drug Administration are more knowledgeable about food safety and drug effectiveness than are judges. Because agencies are specialists in their field, they are in a better position to implement effective public policy.\footnote{Id.} The court believed that judges were more limited in both their knowledge of complex topics and their method for gathering such information. While agencies can develop policy using a wide array of methods, courts are limited to the adversarial process.\footnote{Id. at 852.} Hence, deferring to the experts made sense to the Supreme Court.

Second, Congress simply cannot legislate every detail of a comprehensive regulatory scheme.\footnote{Id. at 844.} 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. In Chevron, the Court presumed that by leaving gaps and ambiguities, Congress impliedly delegated to the agency the authority to resolve them.\footnote{Id. at 843–44.} Third, and finally, administrative officials, unlike federal judges, have a political constituency to which they are accountable. “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”\footnote{Id.}

After Chevron, deference became an all-or-nothing grant of power from Congress. 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 and complete deference would be due to the

interpreting “stationary source.” The first regulation defined “stationary source” as the construction or installation of any new or modified equipment that emitted air pollutants. \textit{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. \textit{Id.} at 858. The bubble concept interpretation allowed a plant to offset increased air pollutant 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. \textit{Id.} at 852. Not surprisingly, environmentalists sued.\footnote{Id. at 844.}
agency’s reasonable interpretation. 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. 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 interpretation of a statute: in this case, the agency was the VA. Yet the Court seemed oblivious to the conflict between its direction in this case and 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. 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…” so long as the injury was “not the result of such veteran’s own willful misconduct…”

The VA had issued a regulation interpreting this statute to cover an injury only if it “proximately resulted (from) carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault” on the part of the VA, or from the occurrence during treatment or rehabilitation or an ‘accident.’ Pursuant to this regulation, the VA denied Brown’s claim, stating that the statute, as interpreted by the regulation, required “fault-or-accident.” The Veterans’ Court reversed, finding that the statute did not contain a fault-or-accident requirement. The Federal Circuit affirmed.

The Supreme Court also affirmed, holding that the regulation was inconsistent with the plain language of the statute. While the Supreme Court should have applied Chevron to analyze whether to defer to the VA’s interpretation in its regulation, the Court did not do so or at least did not do so clearly. Rather, the Court simply looked to the text of the statute, found the language clear and found that language to be inconsistent with the VA’s regulation. Essentially, the Court applied Chevron’s first step and stopped, but the Court certainly did not make clear it was applying Chevron.

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

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71 In a Chevron-only world, deference is “an all-or-nothing grant of power from Congress … either the court adopt[s] or reject[s] the agency’s reasonable interpretation in full.” Linda D. Jellum, Chevron’s Demise: A Survey of Chevron from Infancy to Senescence, 59 Admin. L. Rev. 725, 739 (2007).
73 Id. at 118.
74 Id. at 116.
76 Gardner, 513 U.S. at 117 (quoting 38 CFR § 3.358(c)(3) (1993)).
77 Id. at 117.
78 Id. at 117.
79 Id. at 117.
80 Id. at 118-19.
81 Indeed, the first time the Court cites Chevron is toward the end of the opinion, when the Court quotes another case, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993), which quotes Chevron. Gardner, 513 U.S. at __. Only in the very last paragraph does the Court cite Chevron for justification for the Court’s refusal to defer. Gardner, 513 U.S. at 122.
veteran’s favor." In so doing, the Court cited the footnote dictum from King. The Supreme Court thus morphed 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. In essence with its dictum in 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. Also, none of the subsequent Supreme Court cases in which the majority cited either Boone or Fishgold involved federal agency interpretations of statutes. Rather, all involved situations in which the veteran sued or was sued by a private individual or entity or a city or state government. Perhaps in these situations, Gardner’s Presumption is appropriate. But when an agency interprets a statute, Chevron comes into play. The Supreme Court failed to recognize this conflict in Gardner, and for many years, the lower courts similarly failed to notice it.

III. Gardner’s Presumption in the Courts

For a non-adversarial, young judicial system, Gardner’s Presumption likely appeared as an easy bright-lined, veteran-friendly, interpretive rule. Thus, shortly after the Supreme Court decided Gardner, the Veterans Court and Federal Circuit referred to the presumption relatively regularly, although they 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 before they recognized that it conflicted with Chevron.

A. The Veterans Court’s use of Gardner’s Presumption

Gardner’s Presumption quickly became a legend in veterans’ jurisprudence. Yet the Veterans Court was inconsistent in how it used the presumption. The court occasionally referred to the presumption as the primary support for its holding. More habitually the court referred to the presumption as additional support for its holding. Sometimes the court simply noted the presumption in

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82 Gardner, 513 U.S. at 118.
83 Id.
84 See cases cited in footnotes __. (the 3 following this note).
85 But see Regan v. Taxation With Representation, 461 U.S. 540 (1983) (nonprofit organization not representing veterans sought declaratory judgment that it qualified for tax exempt status after its application for such status was denied by Internal Revenue Service).
86 See, e.g., King v. St. Vincent’s Hosp. 502 U.S. 215 (1991) (Employer brought declaratory judgment action to determine whether employer had to hold open job for military employee who was to be stationed for three years); Alabama Power Co. v. Davis, 431 U.S. 581 (1977) (Veteran sued employer to obtain credit with respect to pension plan for the time veteran spent in the military); Le Maistre v. Jeffers, 333 U.S. 1 (1948) (Veteran sued new land owner to set aside tax deed).
87 See, e.g., Conroy v. Aniskoff, 507 U.S. 511 (1993) (Army officer on active duty, whose property had been sold for failure to pay taxes, sued town and property’s purchasers to quiet title); Dameron v. Brodhead, 345 U.S. 322 (1953) (Army officer, who was domiciled in Louisiana, sued City and County of Denver to recover personal property taxes paid for time he resided in Colorado because of his military assignment).
passing. Importantly, the court regularly failed to mention the case at all when the court’s holding supported the VA’s position, rather than the veteran’s position. Some examples of each use follow.

1. **Gardner’s Presumption as Primary Support**

While rare, the Veterans Court has, on occasion, used Gardner’s Presumption as primary support for its holding; yet, the court commonly does no more than cite the presumption, providing little analysis or explanation. For example, in *Carpenter v. Principi,* the issue for the court was whether an attorney could recover both a 30% contingency fee and an Equal Access to Justice Act (EAJA) award for work on the same case. 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. The VA had held that this dual award was “excessive and unreasonable.”

At issue for the 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 were “the same work.” 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.”

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 is not a veterans’ benefit statute, the court simply cited Gardner’s Presumption 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. The sum total of the court’s reasoning was the following: “If 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.”

The dissents rightly cried foul on the majority’s lack of analysis. Chief Judge Kramer noted: “[T]he majority … fails to provide adequate analysis and legal support for its holding….” Judge Steinberg lamented, “The opinion’s principal state justification for the interpretive leap of equating ‘same work’ with ‘same claim’ seems to be a citation to Brown v. Gardner….”
Steinberg lamented, “The 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....”103 In addition, Judge Steinberg questioned whether Gardner’s Presumption had any applicability when there was no interpretive doubt or ambiguity.104 In short, the dissents noted that Gardner’s Presumption provided no support at all for the majority’s holding. 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 case, Otero-Castro v. Principi,105 the court reviewed the VA’s denial of a veteran’s request for an increased rating for his service connected heart disease.106 The facts are more complicated than merit discussion here. In short, the court found the 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....”107

Because the VA had interpreted its own regulation in this case, rather than a statute, Chevron did not apply.108 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.109 Indeed, there is good reason to believe that Gardner’s Presumption should have no application in these cases.110 Regardless, the court relied on Gardner’s Presumption as the primary support for its holding.111

In the second case, Cottle v. Principi,112 the issue was whether a veteran who had been injured while working as part of his vocational rehabilitation employment “suffered an injury ... as the result of ... the pursuit of a course of vocational rehabilitation...”113 Neither the statute nor the implementing regulations defined the italicized phrase.114 Moreover, the legislative history was similarly not illuminating.115 However, Chevron deference was not appropriate in this case because the only VA interpretation of the statute at issue was made in a general counsel memorandum—a Precedent Opinion

“[T]he majority, in my opinion, fails to provide adequate analysis and legal support for its holding.... [T]he majority makes [its] holding ostensibly based on the veterans benefits precept that any interpretive doubt as to the meaning of the statute—that is, congressional intent as to “same work” must be resolved in favor of the veteran, without discussing pertinent legislative history.” Id. at 94 (Kramer, C.J., dissenting).

105 Id. at 94 (Kramer, C.J., dissenting).
106 Id. at 90 (Steinberg, J., concurring in part and dissenting in part).
107 Id.
109 Id. at 376.
110 Id. at 382 (citing Brown v. Gardner, 513 U.S. 115 (1994)).
111 Traditionally, courts defer almost completely to an agency’s interpretation of its own regulation because the agency wrote the regulation. See generally Jellum, Mastering Chevron Step Zero, supra note __ at ___. 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: for, 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 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.
112 Otero-Castro, 16 Vet. App. at 382.
113 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. See id.
114 Id. at 382.
116 Id. at 332 (quoting 38 U.S. C. § 1151 (1992)).
118 Id. at 334.
issued by the VA General Counsel.\textsuperscript{116} \textit{Chevron} is not appropriate when agencies interpret statutes in this manner.\textsuperscript{117}

The general counsel memorandum concluded that “a participant who is \textit{receiving} only a period of employment services while engaged in post-training employment is not \textit{pursuing} ‘a course of vocational rehabilitation’ within the meaning of [the statute] so as to qualify for disability compensation benefits under that section.”\textsuperscript{118} While acknowledging that interpretations contained within VA regulations would be entitled to deference, the court noted that it owed no deference to “an opinion prepared exclusively for adjudication or litigation of a particular claim....”\textsuperscript{119} The court then rejected the VA’s interpretation, citing \textit{Gardner’s} Presumption.\textsuperscript{120} 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.\textsuperscript{121} The court rejected her choice and chastised her for “fail[ing] to discuss or consider \textit{Gardner} at all.”\textsuperscript{122}

Importantly, in this case the Veterans Court expanded the application of \textit{Gardner’s} Presumption beyond the courtroom. Specifically, the court stressed that \textit{Gardner’s} Presumption required not only courts but the VA to “resolv[e] any interpretative doubt in favor of the veteran....”\textsuperscript{123} For the first time, the court suggested that \textit{Gardner’s} Presumption placed a duty on the agency, in addition to or perhaps instead of the court, to resolve interpretive doubt in favor of the veteran before a case was even litigated. While intriguing, this expansion of \textit{Gardner’s} Presumption has yet to reappear in the court’s jurisprudence; yet, as I will explain below, this approach to \textit{Gardner’s} Presumption may resolve the conflict.\textsuperscript{124}

Despite these three cases, the Veterans Court rarely relied on \textit{Gardner’s} Presumption as the primary support for its holdings. More commonly, the court referred to the presumption merely as additional, or back-up, support.

\section*{2. \textit{Gardner’s} Presumption as Secondary Support}

The Veterans Court referred to \textit{Gardner’s} presumption as supplemental support for its holding favoring a veteran in a number of cases. For example, in \textit{Allen v. Brown},\textsuperscript{125} the court had to determine whether the VA properly denied benefits to a veteran who claimed that a service-connected injury to his right knee aggravated non-service connected injuries in his left knee and hip.\textsuperscript{126} 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.\textsuperscript{127} The statute provided that veterans would receive compensation for “\textit{Disability}}

\begin{footnotes}
\item[116] \textit{Id.} at 351 (Kramer, J., dissenting).
\item[117] For a discussion of when \textit{Chevron} applies and when it does not, see generally, Jellum, Mastering \textit{Chevron} Step Zero, supra note \_ at \_.
\item[118] \textit{Cottle}, 14 Vet. App. at 331 (quoting VA Gen Coun. Prec. 14-97 (Apr. 7, 1997)).
\item[119] \textit{Id.} at 335.
\item[120] \textit{Id.}
\item[121] \textit{Id.} at 336.
\item[122] \textit{Id.}
\item[123] \textit{Id.}
\item[124] \textit{See section \_ infra.}
\item[126] \textit{Id.} at 440.
\end{footnotes}
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. Additionally, a VA regulation interpreting this statute provided: “Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected.” Because “disability” was not defined by either the statute or the regulation to clearly include or exclude aggravation of non-service related injuries, the court correctly interpreted the statute without giving any deference to the agency’s regulation.

To interpret the statute and resolve the issue, the court turned to its holding in an earlier case, Hunt v. Derwinski, in which the court had found the VA’s interpretation of the term “disability” for another statute to be reasonable. The court adopted the same interpretation of “disability” for both statutes. Truthfully, the court’s reasoning is not easy to follow and certainly does not flow automatically from the Hunt holding. Perhaps for this reason, but more likely to further support its interpretation, the court turned to Gardner’s Presumption. Without discussion, the court simply noted that “resolving doubt between [the two interpretations available in this case] requires that such doubt be resolved in favor … of the veteran.” Thus, in Allen, Gardner’s Presumption served as unexplained back-up support for the court’s primary reasoning.

Similarly, in Davenport v. Brown, 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. In other words, did the statute require a causal connection between the injury and the inability to work? The VA had, by regulation, interpreted the statute to require this causal connection. Because the VA had interpreted the statute by regulation, Chevron deference applied. Pursuant to Chevron’s first step, the court rejected the VA’s regulation as contrary to the clear statutory text. Then, the court bolstered this reasoning by saying, “Second, 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.’” As it had in Allen, the Veterans Court offered no further reasoning, explanation, or elaboration for how Gardner’s Presumption court had held that aggravated injuries were covered. To resolve the conflicting case law, the Court decided the Allen case en banc. Allen, 7 Vet. App. at 445.

The Allen court relied on the Hunt holding to resolve the interpretive issue. 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. Thus, the term “disability” in §1153 meant the impairment of earning capacity resulting from an injury (or disease) and not a disease or injury itself. After determining that “disability” had this meaning, the court concluded that:

when aggravation of a veteran’s non-service-connected condition is proximately due to or the result of a service-connected condition, such veteran shall be compensated for the degree of disability (but only that degree) over and above the degree of disability existing prior to the aggravation).


Davenport, 7 Vet. App. at 481. 134

Id. at 484 (quoting Brown v. Gardner, 513 U.S. 115 (1994)).
dictated the outcome in Davenport. Importantly, had the court found “any ambiguity,” the court would have been obligated under Chevron’s second step to adopt the agency’s interpretation, assuming it were reasonable. Yet, the court failed to notice the potential conflict between Chevron and Gardner.

These cases, and many others, show that the Veterans Court regularly referred to Gardner’s Presumption as after-thought, using “even-if” language, and offered little to no analysis of how the presumption applied to the facts of each case. When the court had already resolved the issue in the veteran’s favor, Gardner’s Presumption simply lent additional supportive reasoning for the court’s holding; and, thus, the court apparently felt no need to explain its after-thought support further.

3. Gardner’s Presumption Missing from the Analysis

In contrast, when the Veterans Court resolves the issue in the VA’s favor rather than the veteran’s favor, Gardner’s Presumption contradicts the court’s desired outcome. Perhaps for this reason, the court ignores the presumption altogether in these cases. For example, in Morton v. West, a veteran appealed a VA decision that held that the veteran’s claims were not well grounded. 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. Even though the veteran had not properly raised this issue on appeal, the court heard it.

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 claims is well grounded. The secretary shall assist such a claimant in developing facts pertinent to the claims.

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139 See, 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); Ramsey v. Nicholson, 20 Vet. App. 16, 35 (2006) (stating, “[e]ven assuming the statute in question is a veterans benefits statute rather than a statute setting general guidance for fairness ...”); Smith v. Nicholson, 19 Vet. App. 63, 78 (2005) (stating, “to the extent that there is any reasonable interpretive doubt regarding the meaning of [the statute and its application] ... such doubt is to be resolved in favor of the veteran); Kilpatrick v. Principi, 16 Vet. App. 1, 6 (2002) (saying, “Moreover, even if the Court were to find [the statute] ambiguous, which it does not ... under Brown v. Gardner any interpretive doubt in statutory interpretation is to be ‘resolved in the veteran’s favor’.”); Ryan v. West, 13 Vet. App. 151, 157 (1999) (stating, “At best, the language of the sentence is ambiguous and insufficient to overcome the deeply rooted presumption against retroactive legislation especially in light of the canon that ‘interpretative doubt is to be resolved in the veteran’s favor.’”) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994); Dippel v. West, 12 Vet. App. 466, 472-73 (1999) (mentioning Gardner’s Presumption for additional support); Green v. Brown, 10 Vet. App. 111, 118 (1997) (“If there is any ambiguity in the statute, and the Court finds none, we note that the Supreme Court cautioned . . . that ‘interpretive doubt is to be resolved in the veteran’s favor.’”) (quoting Brown v. Gardner, 513 U.S. 115, 120 (1994)).

140 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 (2008) (dismissing appeal without citing Gardner).

142 Id. at 479.
143 Id.
144 Id. at 480.
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. Thus, one regulation indicated that ““(I)t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim.”” 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 claims.”” Additionally, VA policy statements further obligated the VA to help in all cases. The issue for the 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 clear; the VA was obligated to assist only those claimants who submitted well grounded claims. For this reason, the VA had no authority to promulgate the inconsistent regulations. Thus, the court held against the veteran; in so doing, the court ignored *Gardner’s Presumption* altogether. The court ignored the presumption even though the court quoted *Gardner* 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.” It is unclear whether the court failed to mention *Gardner’s Presumption* because there was no ambiguity in the statute or because the presumption lent no support to the court’s holding. Regardless, based on its prior case law, the court should have at a minimum explained why *Gardner’s Presumption* was inapplicable.

Similarly, in *Bazalo v. Brown*, the EAJA was again at issue. Remember that the EAJA allows litigants to receive attorneys’ fees and expenses when they prevail in litigation against the government. 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. The court held that a defective application could not be corrected after the thirty day time-frame. In so holding, the majority relied on another canon of statutory interpretation, namely that “waiver[s] of sovereign immunity of the United States … are to be strictly construed in the government’s favor.” The majority did not mention *Gardner’s Presumption* likely because both (1) the court’s holding was not favorable to the veteran and (2) the court’s choice of interpretive canon (that waivers of immunity be strictly construed) directly contradicted *Gardner’s Presumption*.

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145 *Id.* at 480 (quoting 38 U.S.C. § 5107(a), (b)).
146 *Id.* at 481 (quoting 38 C.F.R. § 3.102).
147 *Id.* at 481 (quoting 38 C.F.R. § 3.159).
148 *Id.* at 481 (citing Manual M21-1, Part III ¶ 1.03(a) at 7-8 & C&P Policy).
149 *Id.* at 485.
150 *Id.*
151 *Id.* at 485 (quoting Brown v. Gardner, 513 U.S. 115, 122 (1994)).
153 28 U.S.C. § 2412 (____). Because the VA is not the agency administering the EAJA, the VA would not be entitled to Chevron deference for its interpretations. At best, it would be entitled to Skidmore deference. See Linda D. Jellum, *The U.S. Court of Appeals for Veterans’ Claims: Has it Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67, 85-86 (2011). See section __ infra for a further discussion of this issue.
154 See note __ supra (Which says “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 government’s position was not substantially justified; and (4) provide an itemized statement of the fees sought. *Bazalo*, 9 Vet. App. at 308 (citing 28 U.S.C. § 2412 & U.S. Vet. App. R. 39(a), (b)(1)-(3)).
155 *Bazalo*, 9 Vet. App. at 308.
156 *Id.* at 308.
157 *Id.* (citing Grivois v. Brown, 7 Vet. App. 100, 101 (1994)).
158 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. See section __ infra.
In contrast, the dissent referred 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.’”159 The dissent chastised the majority for adopting “so narrow an interpretation of the EAJA, especially when applied against the interests of veterans.”160 Thus, the majority completely ignored Gardner’s Presumption, which was dispositive for the dissent.161

Similarly, in Wright v. Gober,162 the majority failed to 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.163 The veteran had filed a claim in 1954, which was denied by the VA.164 In 1990, he applied to reopen his 1954 claim; this award was granted with an effective date of 1990.165 The veteran appealed, arguing that the effective date should relate back to 1954.166 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.”167 The Veterans Court found this language to be clear and to support the VA’s interpretation.168 Although the majority again quoted Gardner for a different point, the majority neglected to mention Gardner’s Presumption.169 In contrast, the dissent cited Gardner’s Presumption as additional support for its plain meaning interpretation of the statute.170

These cases demonstrate that when the Veterans Court interprets a statute in a way that is contrary to the veteran’s position, the court routinely ignores Gardner’s Presumption. Often when the court does so, the court first finds the statute clear. When the statute is clear, Gardner’s Presumption is inapplicable,171 so the court’s approach has superficial appeal. Yet, it is unlikely the statutes are so clear; indeed, in each of these cases, the dissent found the statutes ambiguous and mentioned Gardner’s Presumption.

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159 Id. at 314-15 (Steinberg, J., concurring in part and dissenting in part) (citing Brown v. Gardner, 513 U.S. 115 (1994)) (“Faced with choosing whether to adopt a highly restrictive and harshly retroactive interpretation … or a less forbidding 30-day requirement … the Court today opts for a retroactive approach that would seem to augur … disqualification of the maximum number of EAJA applications…. “).
160 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. at 315. In other words, once Congress has waived immunity, then courts should not “‘assume the authority to narrow the waiver’” even further. Id. at 315 (quoting Jones v. Brown, 41 F.3d 634, 638 (Fed. Cir. 1994)(quoting U.S. v. Kubrick, 444 U.S. 111, 117-18 (1979)).
161 In Wright v. Gober, 10 Vet. App. 343, 346-47 (1997), the majority similarly did not mention Gardner’s Presumption, finding the language of the statute clear. In this case, Chevron was not applicable because the only VA interpretation of the statute prior to the litigation was by internal memorandum. Id. at 351 (Kramer, J., dissenting). In contrast to the majority, the dissent did refer to Gardner’s Presumption, but only as added support for its plain meaning interpretation of the statute. Id.
162 Id. at 345.
163 Id.
164 Id.
165 Id. at 346 (quoting 38 U.S.C. 5110(b)(1)) (emphasis in original).
166 Id. at 346-47.
167 Id. at 347.
168 The exact quote was as follows:
[A] VA position that adopts a construction less beneficial to a veteran, as well as any VA resolution of statutory or regulatory ambiguity, would have to take into account the impact of Gardner that held that “interpretive doubt is to be construed in the veteran’s favor.”
169 Terry v. Principi, 340 F.3d 1378, 1384 n.7 (Fed. Cir. 2003).
A review of all of the Veterans Court’s cases until 2002 demonstrates that the court neither clearly understood nor regularly analyzed Gardner’s Presumption. Rather, the most commonly cited the presumption simply as back-up support, an “even if” presumption if you like, with little to no analysis. Moreover, when the presumption would have contradicted the court’s holding, the court ignored the presumption altogether.

B. The Federal Circuit’s Use of Gardner’s Presumption

The Federal Circuit has authority to review interpretations of statutes made by the Veterans Court; hence, the Federal Circuit must also address issues of statutory interpretation. When it does so, the court has referred to Gardner’s Presumption more appropriately, even if less frequently than the Veterans Court. For example, in contrast to the Veterans Court, the Federal Circuit cites Gardner’s Presumption regardless of whether the court adopts the VA or veteran’s interpretation. Yet like the Veterans Court, the Federal Circuit’s jurisprudence rarely analyzes the presumption. Most commonly, the Federal Circuit simply refers to Gardner’s Presumption to support its assertion that veterans laws are veteran-friendly.

The Federal Circuit cited Gardner’s Presumption for the first time in 1997, three years after Gardner was decided. In McNight v. Gober,176 the veteran claimed that he had service connected asthma. When the VA denied his claim, the veteran petitioned to reopen it, but he failed to provide “new and material evidence not previously considered.”177 For this reason, the VA denied his petition again.178 On appeal, he argued that the statute obligated the VA to notify him of the extent and quality of evidence

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172 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 which 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 without observance of procedure required by law.” Jones v. West, 194 F.3d 1345, 1349 (Fed.Cir.1999); see 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).

173 See, e.g., Suresly 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, 120 (1994)); Terry v. Principi, 340 F.3d 1378, 1383 (Fed. Cir. 2003). It was also cited once in a Supreme Court dissenting opinion. See Shinseki v. Sanders, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) (quoting Brown v. Gardner, 513 U.S. 115, 120 (1994)) (“And even if there were a question in my mind, I would come out the same way under our longstanding ‘rule that interpretive doubt is to be resolved in the veteran’s favor.’”).

174 See, e.g., McNight v. Gober, 131 F.3d 1483 (Fed. Cir. 1997). 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) 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.” Brief of Appellant 1999 WL 33640284 (U.S.) (emphasis added). 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. Id. at 4 (“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 section __ supra. Not surprisingly, the Supreme Court denied cert. 120 S.Ct. 405 (1999).


177 Id.

178 Id. at 1484.
necessary to prove his claim, whether the VA was aware of any such evidence or not.\textsuperscript{179} Both the Veterans Court and the Federal Circuit disagreed.\textsuperscript{180}

The statute provided, in relevant part, “if a claimant’s application for benefits … is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application.”\textsuperscript{181} There was no relevant interpreting regulation; hence, \textit{Chevron} was inapplicable.\textsuperscript{182} 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.\textsuperscript{183} In rejecting the veteran’s very broad interpretation, the court referred to \textit{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.”\textsuperscript{184} From this statement, it is not entirely clear whether the court failed to find ambiguity, and thus found \textit{Gardner} inapplicable, or whether the court found that even if ambiguity existed, the veteran’s interpretation did not comport with the statutory language. Either alternative flows from the court’s statement. In any event, in this case, the Federal Circuit referred to \textit{Gardner’s} Presumption even though it ultimately adopted the VA’s interpretation. Consistent with its approach to \textit{Gardner’s} Presumption, the Veterans Court had ignored it altogether.\textsuperscript{185}

Just a year later, in \textit{Hodge v. West},\textsuperscript{186} the Federal Circuit again revisited the issue of what evidence was required to reopen a denied claim. The Veterans Court had affirmed the VA’s decision declining to reopen a veteran’s claim for service connected arthritis.\textsuperscript{187} The VA had concluded that the “new” evidence the veteran submitted in support of his request to reopen his claim for service connection was not “material,” and the Veterans Court agreed.\textsuperscript{188} The statute at issue provided: “if new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.”\textsuperscript{189} A VA regulation defined “new and material evidence” as:

\begin{quote}

evidence not previously submitted to agency decisionmakers 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.
\end{quote}

Despite the clarity of the regulation, the Veterans Court had adopted and applied a different standard.\textsuperscript{191} This standard required that there be a reasonable possibility that the new evidence would change the outcome.\textsuperscript{192}

\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. (quoting 38 U.S.C. § 5103(a) (1994)).
\textsuperscript{182} See section ___ infra.
\textsuperscript{183} McKnight, 131 F.3d at 1485.
\textsuperscript{184} Id. (citation omitted).
\textsuperscript{186} 155 F.3d 1356 (1998).
\textsuperscript{187} Id. at 1358.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1359 (quoting 38 U.S.C. § 5108).
\textsuperscript{190} Id. at 1359 (quoting 38 C.F.R. § 3.156(a) (1994)).
\textsuperscript{191} Id. The Veterans Court borrowed from social security benefits law.
\textsuperscript{192} Id. at 1360.
The Federal Circuit reversed, rejecting the Veteran Court’s standard. Unlike *Mcknight*, in this case, *Chevron* applied because there was an interpreting regulation. 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.” 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*, 513 U.S. 115 … (1994), 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.

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 and the Veterans Court’s interpretation. The veteran had not offered an interpretation. Rather, because the VA’s interpretation was more veteran-friendly than the Veteran Court’s interpretation and was reasonable under *Chevron*, the VA’s interpretation controlled. Thus, the Federal Circuit neither confronted nor addressed the *Chevron/Gardner* conflict in this case. Rather, *Chevron* and *Gardner* both pointed to the same result.

The Federal Circuit again dodged the *Chevron/Gardner* conflict in *Jones v. West*. In this case, the court concluded that the language at issue was clear and, thus, rejected the veteran’s interpretation. Because the language of the statute 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*, 467 U.S. 837 … (1984). For similar reasons, the mandate of *Brown v. Gardner*, 513 U.S. 115 … (1994), that “interpretive doubt is to be resolved in the veteran's favor” has no bearing on the resolution of this case.

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

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193 *Id.*
194 *Id.*
195 *Id.* at 1361 n.1 (some citations omitted).
196 *Id.* at 1361.
197 *Id.*
198 136 F.3d 1296 (Fed. Cir. 1998).
199 *Id.*
200 *Id.*
201 *Accord* Terry v. Principi, 340 F.3d 1378 (2003) (stating, “These definitions do not render the statute ambiguous. Consequently, we are not faced with the situation in which statutory language gives rise to interpretive doubt that must be resolved in favor of the veteran. *See Brown v. Gardner*, 513 U.S. 115, 118 … (1994).”).
IV. Judicial Recognition of the *Chevron/Gardner* Conflict

The Veterans Court’s and Federal Circuit’s later jurisprudence shows two courts struggling first to notice that *Gardner’s* Presumption and *Chevron’s* second step conflict and, second, to resolve that conflict once they finally identified it. The Veterans Court first noticed and tried to resolve the conflict in 2002. Initially, the court favored *Gardner’s* Presumption, but that preference soon appeared reversed. In 2006, twelve years after the Supreme Court decided *Gardner*, the Veterans Court suggested that when *Gardner’s* Presumption and *Chevron* conflicted, *Chevron* should triumph. Interestingly, once the court recognized that the conflict existed and tried to resolve it, the court began to resolve cases more favorably to the VA. In contrast, the Federal Circuit noticed the conflict two years earlier than the Veterans Court, however, unlike the Veterans Court, the Federal Circuit favored *Chevron* over *Gardner*. Truthfully, neither court has satisfactorily resolved the conflict. In 2004, the Veteran’s Court begged the Supreme Court for guidance. None has been forthcoming. The sections below explore the courts’ awakening to the conflict and their unsuccessful attempts to resolve it.

A. The Veterans Court Explores the Conflict

Until 2002, the Veterans Court seemed oblivious to the conflict between *Gardner’s* Presumption and *Chevron’s* second step. Then, in an unpublished opinion, the Veterans Court not only recognized the conflict, the court unsatisfactorily tried to resolve it in *Jordan v. Principi*.

In that case, a veteran injured his knee in a motorcycle accident before he entered the military. Yet, the veteran failed to disclose this injury to the military when he entered service. When the injury flared up, he was treated and discharged for “erroneous enlistment.” At discharge, the VA concluded that the injury was preexisting and was not aggravated by military service. The veteran did not challenge this decision when it was issued in 1983, but rather waited until 1998, almost fifteen years, to do so. The VA denied the 1998 petition, in which the veteran argued that the 1983 VA decision contained clear and unmistakable error.

On appeal before the Veterans Court, the parties argued about the proper interpretation of two statutes that both applied and yet conflicted. Trying to reconcile these statutes long before this case, the VA had issued two interpreting regulations. 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. Importantly, the court then noted for the first time the tension between *Chevron* and *Gardner*, calling them “competing principles of statutory construction.” Applying *Chevron’s* second step, the court found the VA...

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203 *Boyer v. West*, 210 F.3d 1351 (Fed. Cir. 2000).
205 *Id*. at 336. *Error! Bookmark not defined.*
206 *Id*. at 337.
207 *Id*. at 337.
208 *Id*. at 337.
209 *Id*. at 338.
211 *Id*. at 345 (quoting 38 C.F.R. §§3.304(b) & 3.306(a)).
212 *Id*. at 346.
213 *Id*. at 345. *Error! Bookmark not defined.*
regulations to be reasonable interpretations of the two statutes. The court rejected the veteran’s interpretation as “absurd.”

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 interpretation.” With this backdrop, the court tried to resolve the conflict between Chevron’s second step and Gardner’s Presumption by suggesting that Gardner’s Presumption should trump Chevron’s second step unless the veteran’s interpretation was unreasonable. 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.

Yet the resolution simply fails. Under Chevron, agencies have the authority to interpret ambiguous statutes. 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. 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. Agencies have this power, not veterans. Moreover, agencies theoretically can select only reasonable interpretations. An unreasonable interpretation would never be acceptable whether the agency or 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 agency’s interpretation would control only when the agency’s interpretation is the only reasonable interpretation of a statute. Hence, the court’s resolution does little more than state one obvious fact—that absurd interpretations cannot be adopted—and one incorrect fact—that veterans have the power to determine what ambiguous statutes mean so long as they proffer a reasonable interpretation.

Under Chevron, the Court must defer to permissible agency constructions of a statute, if “Congress has not directly addressed the precise question at issue”. Chevron, 467 U.S. at 843…. A competing principle of statutory construction is that, where a statute is ambiguous, “interpretive doubt is to be resolved in the veteran’s favor.” Brown v. Gardner, 513 U.S. at 118….
In 2004, the Veterans Court again explored and tried to resolve the conflict. In *Debeaord v. Principi*, a veteran challenged the VA’s denial of his request for an increased rating for vision impairment. 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. 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 nonservice-connected disability” to recover benefits as if each injury were service-connected. The statute did not define “blindness.”

Although the VA had a “confusing tapestry” of regulations defining blindness for other purposes, none of these regulations specifically defined “blindness” for the statute at issue. To resolve the statute’s meaning, the court turned to other definitions of “blindness” in related statutes. After doing so, the court rejected the veteran’s interpretation because the court believed that the veteran’s “more generous definition … would result in compensating a veteran for a non-service-connected degree of impaired vision at a rate higher than the rate that would apply if the same degree of vision impairment had resulted from service.” In other words, the court found the veteran’s interpretation absurd.

Ultimately the court did not specifically define “blindness.” 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*.” Additionally, the court noted that *Chevron* did not apply because there were no interpretive regulations. Despite concluding neither *Gardner’s Presumption* nor *Chevron* applied, the court discussed the conflict anyway and completely muddled the analysis:

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*, 502 U.S. 215, 220-21, n.9 … 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.*, 328 U.S. 275, 285 … a case decided long before *Chevron*. Not only withdrew the opinion. *Id.* at 265 (citing Jordan, 2002 WL 31445159, at *2). 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 he created, 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.

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226 *Id.* at 358.
227 *Id.*
228 *Id.* at 363 (quoting 38 U.S.C. § 1160(a)(1)(2003)).
229 *Id.* at 363.
230 *Id.* at 366.
231 *Id.* at 367.
232 *Id.*
233 *Id.* at 366.
234 *Id.* at 368.
235 *Id.*
236 *Id.*
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*.... *Cf. Edmond v. United States*, 520 U.S. 651, 657... (1997) (stating that “(o)rdinarily, where a specific provision conflicts with a general one, the specific governs”); *HCSC-Laundry v. United States*, 450 U.S. 1, 6 ... (1981) (per curiam) (noting that “it is a basic principle of statutory construction that a specific statute ... controls over a general provision ..., particularly when the two are interrelated and closely positioned”). ... In the last analysis, guidance from the Supreme Court would appear necessary to resolve this matter definitively. 238

The court’s analysis is wrong in several ways. First, this case, *Debeaord*, did not actually involve a conflict between *Chevron* and *Gardner’s* Presumption. Because there was no regulation interpreting the statute at issue, *Chevron* was simply not applicable. 239 Because there was no conflict, the court should not have addressed the issue; hence, the language is *dicta* 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—Fishgold v. Sullivan Drydock & Repair Corp.* 240—and then reaffirmed the existence of the presumption in a case decided after the Court decided *Chevron—King v. St. Vincent’s Hospital*. 241 King’s reaffirmation of *Fishgold*, the court concluded, meant that *Gardner’s* Presumption should prevail over *Chevron* whenever there is conflict. Yet, this conclusion is based on an incomplete analysis of the underlying cases. Neither *King* nor *Fishgold* involved agency interpretations of statutes; hence, *Chevron* did not apply. Whether *Chevron* was decided before or after these cases were decided is thus completely irrelevant to the resolution of the conflict between *Chevron* and *Gardner*. It is entirely possible that in cases in which a court interprets a statute without an agency regulation to help, *Gardner* should apply and that in cases in which a court interprets a statute in light of an agency interpretation, then *Chevron* should apply. Simply put, the timing of the cases, without more, tells us nothing because the Supreme Court did not do the issue.

Third, and finally, the Veterans Court finished its analysis in *Debeaord* by suggesting that specific statutory provisions control general statutory provisions whenever there is a conflict. This principle is indeed accurate. Yet the court implies that this principle resolves the conflict between *Chevron’s* second step and *Gardner’s* Presumption. The court implies 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. 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. Nor should it be used as such because the specific-general canon is based on legislative behavior not on judicial behavior. 242 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. 243 Thus, the specific-

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238 Id.
239 See section __ supra. Whether *Skidmore* (*Skidmore v. Swift*, Co., 323 U.S. 134 (1944)) analysis should have applied is another question, one beyond the scope of this article. But see generally, Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?*, 3 VETERAN’S L.J. 67 (2011) (exploring when *Chevron* deference rather than *Skidmore* deference is appropriate in the context of veteran’s jurisprudence).
240 328 U.S. 275 (1946).
242 Jellum, *Mastering Statutory Interpretation*, supra note __ at __.
243 *Id.*
general canon is completely inapplicable to resolving the conflict between *Chevron*’s second step and *Gardner*’s Presumption; the court’s reliance on it was completely misplaced. Indeed, the only persuasive point in the court’s analysis is its parting comment—that the Supreme Court should “resolve this matter definitively.”

Two years later, in 2006, the Veterans’ Court tried again to resolve the conflict; this time suggesting that *Chevron*’s second step should trump *Gardner*’s Presumption. In *Haas v. Nicholson*, the court addressed the issue of whether a 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.” A statute presumed that any veteran who “served in the Republic of Vietnam” during specified time periods was exposed to Agent Orange. The VA promulgated a regulation interpreting this statutory phrase to apply only to those service members whose service involved “duty or visitation” in Vietnam. 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. Because Haas had served on a ship that was located near Vietnam but had never actually set foot in the country, the VA denied benefits.

Haas appealed, and the Veterans Court reversed. In its reasoning, the court looked first to the statute, acknowledging that it was ambiguous. The court then incorrectly turned to *Chevron*. I say “incorrectly” because *Chevron* is not the appropriate deference standard when an agency interprets its own regulation; *Auer* deference applies. 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*, 513 U.S. at 118 … does not appear to apply in this instance. In *Terry v. Principi*, the U.S. Court of Appeals for the Federal Circuit (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.” 340 F.3d 1378, 1384 (Fed.Cir.2003). 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.”

The court said nothing more about *Gardner* and *Chevron*. Instead, the court found the regulation to be ambiguous and then turned to evaluate the VA’s interpretation of its regulation—that “duty or visitation” meant a veteran must have actually stepped onto the land. The court, wrongly, rejected the

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244 *Debeaord*, 18 Vet. App. at 368.
246 *Nicholson*, 20 Vet. App. at 263.
247 Id. (quoting 38 U.S.C. 1116(f)).
248 *Id.* at 269 (citing 38 C.F.R. § 3.307(a)(6)(iii)).
249 *Id.* at 267.
250 *Id.* at 259.
251 *Id.* at 269.
252 *Id.* at 269.
253 *Id.* at 269.
254 Jellum, Mastering Statutory Interpretation, *supra* note __ at __.
255 20 Vet. App. at 269 n.4.
256 *Id.* at 269.
VA’s interpretation of its own regulation.\textsuperscript{257} It appears that the court simply disagreed with the interpretation and so substituted its own. Indeed, the case was reversed on appeal for this reason.\textsuperscript{258}

In 2007 in \textit{Sursely v. Peake},\textsuperscript{259} the Veterans Court again noted the conflict between \textit{Chevron}'s second step and \textit{Gardner’s} Presumption, but this time the court ducked analysis of the issue entirely. In this case, the court affirmed a VA decision that refused a veteran’s request for two, separate clothing allowances.\textsuperscript{260} The relevant statute authorized clothing allowances for disabled veterans who use a prosthetic or orthopedic appliance that tends to wear out or tear clothing.\textsuperscript{261} Because the veteran had two, separate disabilities, he requested two, separate clothing allowances.\textsuperscript{262} The VA denied the second claim because the relevant statute used the singular: “shall pay a clothing allowance of $588 per year.”\textsuperscript{263} The Veterans Court affirmed the denial, finding the statutory language clear.\textsuperscript{264} The court did not mention \textit{Gardner’s} Presumption initially because it found the statute clear and unambiguous.\textsuperscript{265} However, after finding the statute clear, the court turned its attention to an interpreting regulation to determine whether \textit{Gardner’s} Presumption applied.\textsuperscript{266} The court discussed, but did not resolve, the conflict between \textit{Chevron}'s second step and \textit{Gardner’s} Presumption. In so doing, the court referred to the Federal Circuit’s decisions in \textit{Disabled American Veterans v. Gober},\textsuperscript{267} \textit{Boyer v. West},\textsuperscript{268} and \textit{Sears v. Principi},\textsuperscript{269} discussed elsewhere in this article:\textsuperscript{270}

The Federal Circuit has discussed the relationship between \textit{Brown} and the second part of the \textit{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 administering agency has issued a reasonable gap-filling or ambiguity-resolving regulation, (the Court) must uphold that regulation”\textsuperscript{271}

After describing the Federal Circuit’s concerns, the court proceeded to find the regulation and the statute to be clear; hence, because the regulation and statute were unambiguous, “[there was] no reason to apply [\textit{Gardner’s} Presumption] in this instance.”\textsuperscript{272}

\textsuperscript{257} An agency’s interpretation of its own regulation is respected unless it is plainly wrong. \textit{See} note ___ \textit{supra}. 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 ambiguous regarding whether a veteran had to step onto Vietnam 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 prior, consistently held agency views, [was] plainly erroneous in light of its interpretation of legislative history, and was unreasonable as an interpretation of VA’s own regulations.” \textit{Nicholson}, 20 Vet. App. at 270.

\textsuperscript{258} \textit{Haas v. Peake}, 525 F.3d 1168 (Fed. Cir. 2008).

\textsuperscript{259} \textit{Id}. at 23.

\textsuperscript{260} \textit{Id}. at 27.

\textsuperscript{261} \textit{Id}. (referring to 38 U.S.C. §1162 (2003) (emphasis added)).

\textsuperscript{262} \textit{Id}. at 22 (“The statutory language… clearly provides only one clothing allowance per eligible veteran.”).

\textsuperscript{263} \textit{Id}. at 27.

\textsuperscript{264} \textit{Id}. at 27.

\textsuperscript{265} \textit{Id}. at 23.

\textsuperscript{266} \textit{Id}. at 23.

\textsuperscript{267} \textit{Id}. at 27.

\textsuperscript{268} 234 F.3d 682, 692 (Fed. Cir. 2000).

\textsuperscript{269} 210 F.3d 1351, 1355 (Fed. Cir. 2000).

\textsuperscript{270} \textit{Sursely}, 22 Vet. App. at 26 (citations omitted).

\textsuperscript{271} \textit{Id}. at 27.
Gardner’s Presumption

On appeal, the Federal Circuit disagreed and reversed. Finding that the regulation merely parroted the statute, the court refused to apply Chevron. Instead, the court found the legislative history and Gardner’s Presumption to be dispositive. Thus, in Sursely the Federal Circuit found Gardner’s Presumption (and the legislative history) to be dispositive, while the Veteran’s Court refused to apply Gardner’s Presumption because the statute was so clear. In short, the jurisprudence of the two courts was at odds.

B. The Federal Circuit Explores the Conflict

While the Federal Circuit was the first of the two courts to notice the conflict, unlike the Veterans Court, which initially favored Gardner, the Federal Circuit immediately favored Chevron. The Federal Circuit first noted the possible conflict in 2000, 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. Then in 2010, the court suggested, in dicta, that Gardner’s Presumption is merely a canon of last resort when all other avenues for resolving ambiguity fail. 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’s second step was Boyer v. West. In this case, the veteran actually raised the conflict by arguing in his brief that Gardner’s Presumption always trumped Chevron. However, the veteran was ill-advised to make this argument in this case because Chevron was simply inapplicable; there was no interpreting regulation. Despite the fact that Chevron did not apply, the Federal Circuit responded to the veteran’s argument by saying that Gardner’s Presumption is inapplicable when a statute is clear. Here, the court concluded that the statute was clear and that the VA’s interpretation was consistent with the clear language. The court then responded to the veteran’s argument by cautioning veterans not to “rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.” Because Chevron did not apply and because the

273 Sursely v. Peake, 551 F.3d. 1351 (Fed. Cir. 2009).
274 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).
275 Sursely, 551 F.3d at 1367.
276 By changing the qualification for a clothing allowance from single or multiple orthopedic appliances to only a single qualifying appliance, Congress evidenced a clear intent to provide additional benefits for those veterans such as Mr. Sursely who use multiple orthopedic appliances. Second, in the face of statutory ambiguity, we must apply the rule that “interpretive doubt is to be resolved in the veteran’s favor.” Brown, 513 U.S. at 118.
277 Id. at 1354 (citations omitted) (“[The veteran] recognizes, correctly so, that this court must generally defer to an agency’s reasonable interpretations of an ambiguous statute under Chevron.... Nevertheless, [he] argues that the agency must interpret any ambiguity in the statute in the veteran’s favor. Because the Agency’s interpretation of the relevant statutes is less favorable to the veteran than the alternative the veteran proposes, [he] asserts, this court must conclude that the Agency’s interpretation is invalid.”). 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).
279 Id. at 1355 (citations omitted) (stating, “As an initial matter, we certainly agree with [the veteran] that when we find an ambiguity in a veterans’ benefit statute, “interpretive doubt is to be resolved in the veteran’s favor.””).
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.

It was not long, however, before the Federal Circuit addressed the conflict more directly. In Disabled American Veterans v. Gober, the statute at issue allowed veterans to challenge existing VA decisions for “clear and unmistakable error.”282 Chevron applied because the VA had issued regulations interpreting this language.283 Noting the conflict between Gardner’s Presumption and Chevron’s second step, the court cautioned litigants that while Gardner’s Presumption may “modify[],” it does not trump Chevron’s second step.284 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 tension because the issue on appeal involved a procedural challenge rather than an interpretive challenge.285 Thus, the court offered no further guidance on how Gardner modified Chevron.

A year later, in 2001, the Federal Circuit referred to the conflict yet again in dicta, 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,286 the statute at issue provided that specific benefits would be awarded to veterans “who [were] … entitled to receive ... compensation at the time of death....”287 The court concluded that the phrase “entitled to receive” was ambiguous because the legislative history suggested one interpretation while Gardner’s Presumption suggested another.288 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.’”289 Chevron was not an issue in this case because the interpreting regulation was not issued through notice and comment procedures.290 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.291 In saying that Chevron would be the next step, the court suggested that Gardner’s Presumption was part of Chevron’s first step. In other words, the court seemed to be suggesting that if Gardner’s Presumption were to resolve the ambiguity at Chevron’s first step, then Chevron’s second step would be unnecessary. Again, the court’s analysis is simply wrong. Chevron’s first step addresses whether Congress was clear and intended a particular meaning.292 While it is possible that Congress would intend a veteran-friendly interpretation for a veterans’ benefits statute, it is not certain. Moreover, how veteran friendly must the

282 234 F.3d 682 (Fed. Cir. 2000).
283 Id. at 686. Several veterans groups challenged the regulations on procedural and interpretive grounds. Id.
284 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 “interpretive doubt is to be resolved in the veteran’s favor,” Brown v. Gardner, 513 U.S. 115, 118 (1994). 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 692-92 (citations omitted).
285 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 that the VA did not respond adequately to comments submitted during the rulemaking process. Id. at 692.
286 260 F.3d 1365 (Fed. Cir. 2001).
287 Id. at 1377 (quoting 38 U.S.C. § 1318(b) (Supp. V 1999)).
288 Id. at 1377. 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.
289 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 interpretive regulation, the Federal Circuit essentially ignored that history pursuant to Gardner’s Presumption simply because the interpretation was less favorable to the veteran.
290 Id. at 1378 (stating, “[w]hile the parties do not argue the point, the Supreme Court has held that Chevron deference does not normally apply to informal rulemakings.”).
291 Id.
interpretation be? Finally, if Gardner’s Presumption were a part of *Chevron’s* first step, when would a court ever get to *Chevron’s* second step? Ultimately, the court remanded *National Organization of Veterans’ Advocates, Inc.* on other grounds.295

In 2003,294 the Federal Circuit for the first time addressed the conflict head on. In *Sears v. Principi,*295 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.”296 At issue in the case was a VA regulation that established an effective date for a veteran’s post traumatic stress disorder claim.297 The language in the statute provided that the effective date of such a claim “shall not be earlier than the date of receipt of application therefor.”298 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 is later.”299 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.300

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."301 The court applied *Chevron* finding first that the statutory language was ambiguous and finding second that the VA’s interpretation was reasonable.302 Turning to the veteran’s alternative argument—that Gardner’s Presumption always trumps *Chevron’s* second step—the court said, “Even 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.”303 Indeed, the court noted that neither it nor the veteran could identify “a single case in which this court has invalidated a regulation that would otherwise be entitled to *Chevron* deference on this ground.”304 Thus, in this case, Gardner’s Presumption lost to *Chevron*; however, the Federal Circuit did

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291 *Nat’l Org. of Veterans’ Advocates, Inc.*, 260 F.3d at 1380 (remanding for the VA to reconcile inconsistency with the regulation at issue and another VA regulation).
292 In 2003, the Federal Circuit also briefly mentioned both doctrines in *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 330 F.3d 1345 (Fed. Cir. 2003). Note that this case has the same name as *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001), however, the cases are unrelated. In this later case, the court failed to acknowledge, let 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 Resources Defense Council, Inc.*, 467 U.S. 837, 842-43… (1984).… 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.” *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed Cir. 2001) (citing *Brown v. Gardner*, 513 U.S. 115, 118 … (1994)).

293 *Nat’l Org. of Veterans’ Advocates, 260 F.3d at 1350.*

> 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* 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. *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.

294 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).
295 *Id.* at 1331.
296 *Id.* at 1329.
297 *Id.* (quoting 38 U.S.C. §3004).
298 *Id.* at 1328 (quoting 38 C.F.R. § 3.400(q)(i) (2003)).
299 *Id.*
300 *Id.*
301 *Id.*
302 *Id.* at 1330.
303 *Id.* at 1331-32.
304 *Id.* at 1332 (stating further that there is no reason why *Chevron* would not apply to VA regulations).
not explain specifically how to resolve the conflict between *Gardner’s* Presumption and *Chevron*’s second step. Rather, *Gardner’s* Presumption simply played no role in the court’s reasoning. Arguably, *Gardner’s* Presumption simply has no role in cases in which *Chevron* is applicable; but the court was unclear on this point.

Later that same year, however, the Federal Circuit stated more clearly that *Gardner’s* Presumption did not apply in cases in which *Chevron* did apply. In *Terry v. Principi*, the veteran sought compensation for an eye condition that the VA had excluded from coverage. 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. The VA by regulation had excluded certain conditions, including “refractive error of the eye,” from the terms “injury” and “disease.” Thus, the VA denied his claim, and the veteran appealed. On appeal, the Federal Circuit applied *Chevron* and found the statute to be ambiguous and the VA’s interpretation to be a reasonable interpretation of that ambiguous language. 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].” Speaking directly to the conflict, the court said that *Gardner’s* Presumption “does not affect the determination of whether an agency’s regulation is a permissible construction of a statute.” In other words, *Gardner’s* Presumption is simply inapplicable when *Chevron* applies.

Seven years later, in 2010, the Federal Circuit contradicted itself when it again addressed the conflict in *dicta*. 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*, the veteran lost almost all of his teeth as a result of having a severe periodontal infection while in the service. The VA granted him service connection for the loss of teeth, but denied his request for dentures pursuant to a statute that provided veterans with “outpatient dental care and related dental appliances for ‘service-connected dental condition(s) or disability(ies) due to combat wounds or other service trauma.’” The issue for the court was whether dental treatment could be considered a “service trauma.” The VA rejected this interpretation, stating that “service trauma” did not include “the intended result of proper medical treatment provided by the military.”

Because the VA had not interpreted this language by regulation, *Chevron* did not apply. Nonetheless, the court addressed the conflict between *Chevron*’s second step and *Gardner’s* Presumption...
because the veteran argued that Gardner’s Presumption should be the first place for a court to turn in the face of statutory ambiguity. The Federal Circuit rejected this argument and suggested, in dicta, that Gardner’s Presumption was a method of last, not first, resort:

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 the Brown canon. Rather, that canon is only applicable after other interpretive guidelines have been exhausted, including Chevron. Here, applying other interpretive tools, we conclude that § 1712(a)(1)(C) is not ambiguous.

According to this dicta, Gardner’s Presumption is simply an interpretive canon for courts to apply when all else, including Chevron, fails.

Thus, in the Federal Circuit, Gardner’s Presumption morphed from a veteran’s ace in the hole to a canon of last resort. In its final cases addressing the conflict, the Federal Circuit made clear its belief that Gardner’s Presumption yields to Chevron. According to Nielson, 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. If the dicta in Nielson is correct, then the only time Gardner’s Presumption would apply in a Chevron case would be when the VA interpreted the statute in an unreasonable manner. This is true because if the VA interpreted the statute in a reasonable manner, then no ambiguity would remain. Yet with this dicta, the court ignored its earlier suggestion from both Terry v. Principi and Sears v. Principi, that Gardner’s Presumption is simply inapplicable in cases involving Chevron.

So, which understanding is correct? Should Gardner’s Presumption trump Chevron’s second step, have no application in Chevron cases, or be a canon of last resort to be applied only when the VA’s interpretation is unreasonable? Neither the Federal Circuit nor the Veterans Court has definitely or clearly resolved the conflict.

V. RESOLVING THE CONFLICT

Gardner’s Presumption and Chevron cannot exist harmoniously. This section identifies and explores ways to resolve the conflict. At bottom, Gardner’s Presumption should have no role in cases

320 Id. at 808
321 Id. The court cited to a number of its prior precedents as support for its assertion. Id. at 808, n.4 Thus, footnote four provided the following list of supporting cases: Terry v. Principi, 340 F.3d 1378, 1383-84 (Fed.Cir.2003) (finding no interpretive doubt requiring the application of Brown following consideration of plain language of statute and Chevron analysis); Nat’l Org. of Veterans’ Advocates, 260 F.3d at 1378 (turning to Chevron after noting that legislative history and Brown canon pushed in opposite directions); Jones v. West, 136 F.3d 1296, 1299 & n.2 (Fed.Cir.1998) (noting that Brown not applicable because statute was clear when read in conjunction with another provision); see also Sears v. Principi, 349 F.3d 1326, 1331-32 (Fed.Cir.2003) (“The appellant argues ... that Chevron deference is inappropriate in veterans’ cases such as this one, because any interpretive doubt in the context of veterans’ benefits statutes is to be resolved in the veterans’ favor.... We do not agree.” (citation omitted)); cf. Sursely v. Peake, 551 F.3d 1351, 1355-57 & n.5 (Fed. Cir. 2009) (turning to Brown after other interpretive guidelines did not resolve ambiguity)). Error! Bookmark not defined.
322 340 F.3d 1378 (Fed. Cir. 2003).
323 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).
involving VA interpretations entitled to *Chevron* deference.\textsuperscript{324} Moreover, in those cases in which *Gardner’s Presumption* should have a role—those cases in which the VA’s interpretation is not entitled to deference—the presumption should be returned to its original form: a preference for liberal interpretation of veterans’ benefits statutes. Alternatively, *Gardner’s Presumption* might be viewed as a duty belonging to the VA rather than an interpretive tool belonging to the courts. This next section explores all of these options.

**A. The Presumption Should Return to a Liberal Construction Canon**

Regardless of any other changes they may make to *Gardner’s Presumption*, courts should transform the presumption back to the liberal construction canon of its youth. When the courts first created and applied this presumption in *Boone v. Lightner*,\textsuperscript{325} they simply applied the familiar interpretive canon that remedial statutes should be construed liberally in the veteran’s favor.\textsuperscript{326} This formulation of *Gardner’s Presumption* (*Boone’s interpretive canon*) made sense; when a statute was ambiguous, putting the veterans’ interests above private individuals, such as employers,\textsuperscript{327} and above governmental interests, such a state or county,\textsuperscript{328} rewarded veterans for their service to this country. The Supreme Court in *King v. St. Vincent’s Hospital*\textsuperscript{29} transformed *Boone’s interpretive canon* from a simple directive to courts to construe veterans’ benefits statutes liberally to a terse directive to courts to construe such statutes in favor of veterans. That change was neither explained nor necessary: a liberal construction canon is sufficiently veteran-friendly, without being overly veteran-friendly. Such a canon balances the competing interests while still protecting the veteran much better than the trump card approach used today.

As currently formulated, *Gardner’s Presumption* 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. Peak*.\textsuperscript{330} 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.”\textsuperscript{331} The VA had promulgated a regulation interpreting this phrase to apply only to those service members whose service involved “duty or visitation” in Vietnam.\textsuperscript{332} 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.\textsuperscript{333} The veteran had appealed the VA’s decision and lost.\textsuperscript{334}

\textsuperscript{324} See Linda D. Jellum, *The U.S. Court of Appeals for Veterans’ Claims: Has it Mastered *Chevron*’s Step Zero?*, 3 VETERANS L. REV. 67, __ (2011) (explaining when *Chevron* rather than *Skidmore* deference is the appropriate standard for courts to use to review VA interpretations of statutes).
\textsuperscript{325} 319 U.S. 561, 575 (1943).
\textsuperscript{326} See section __ supra.
\textsuperscript{327} See, e.g., cases cited in footnote __ supra (See, e.g., *King v. St. Vincent’s Hosp.* 502 U.S. 215 (1991) (Employer brought declaratory judgment action to determine whether employer had to hold open job for military employee who was to be stationed for three years); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977) (Veteran sued 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 (1948) (Veteran sued new land owner to set aside tax deed)).
\textsuperscript{328} See, e.g., cases cited in footnote __ supra (See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511 (1993) (Army officer on active duty, whose property had been sold for failure to pay taxes, sued town and property’s purchasers to quiet title); *Dameron v. Brodhead*, 345 U.S. 322 (1953) (Army officer, who was domiciled in Louisiana, sued City and County of Denver to recover personal property taxes paid for time he resided in Colorado because of his military assignment)).
\textsuperscript{330} 544 F.3d 1306, 1308 (Fed. Cir. 2008)
\textsuperscript{331} Id. at 1307-08.
\textsuperscript{332} See supra, 3.307(a)(ii).
\textsuperscript{333} Supra, 3.307(a)(ii).
\textsuperscript{334} Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).
Petitioning for rehearing, the veteran argued that the Veterans Court should have applied *Gardner’s Presumption.* Petitioning for rehearing, the veteran argued that the Veterans Court should have applied *Gardner’s Presumption.* The Federal Circuit disagreed. The veteran neglected to raise the issue during his original appeal, thus the court held that the argument had been waived. However, in so holding, the court noted one difficulty of applying *Gardner’s Presumption:* “[T]his case would present a practical difficulty in determining what it means for an interpretation to be ‘pro-claimant.’” 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. Haas wanted an even more pro-veteran interpretation. Thus, the case raised this question: Exactly how veteran-friendly must an interpretation be to survive a *Gardner* attack? The answer to this question is currently unclear; whenever, a veteran is in danger of losing benefits under the VA’s interpretation of a statute, that veteran will allege that the interpretation is not veteran-friendly enough. Unless the veteran’s interpretation is absurd, the courts’ current articulation of this Presumption suggests that the veteran must win. If instead, *Gardner’s Presumption* simply requires that veterans’ benefits statutes be liberally construed, then balance can be restored. Veterans’ benefits statutes should be construed liberally, as all remedial statutes should be. Veterans’ benefits statutes need not be construed to allow the veteran-litigant win in every case.

Thus, regardless of whether *Gardner’s Presumption* should be returned to its humble beginnings: 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. *Gardner’s Presumption* should re-morph.

**B. The Presumption Applies to Veterans’ Benefits Statutes Only**

Regardless of whether the courts return *Gardner’s Presumption* to its liberal construction beginnings, *Gardner’s* application must be curtailed. First, 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* deference: When an agency interprets a generally applicable statute, such as the tax code, *Chevron* deference does not apply.

The Veterans Court and Federal Circuit have explored this limitation. For example, the VA raised this issue during the appeal of *Bazalo v. Brown.* In that case, the VA had interpreted the EAJA, a generally applicable statute that applies to more than just veterans. The issue in *Bazalo*

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335 Haas, 544 F.3d. at 1308.
336 Id.
337 Id. at 1308-09.
338 Id. at 1309.
339 Id. at 575. Or, as Justice Douglas noted in a later case, “But 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).
340 Jellum, supra note ___ at 84-85 (Veterans L. Rev.).
341 9 Vet. App. 304 (1996). 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. 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 government’s position was not substantially justified; and (4) provide an itemized statement of the fees sought. *Bazalo,* 9 Vet. App. at 308 (citing 28 U.S.C. § 2412 & U.S. Vet. App. R. 39(a), (b)(1)-(3)).
was whether the veteran had to submit proof of his net worth within a thirty day filing window.\textsuperscript{344} The Veterans Court held that the veteran could not supplement the defective application after thirty days.\textsuperscript{345} In its reasoning, the majority did not mention \textit{Gardner’s Presumption}.\textsuperscript{346}

When the veteran appealed the case to the Federal Circuit, the VA argued, among other things, that \textit{Gardner’s Presumption} was not applicable 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.\textsuperscript{347} Hence, the VA noted that the presumption was inapplicable. The majority dodged the issue entirely saying, “In 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.”\textsuperscript{348} In contrast, the dissent agreed with the VA: “The 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.”\textsuperscript{349} The dissent’s approach is the correct one; \textit{Gardner’s Presumption} should not apply to generally applicable statutes.

In a more recent case, the Veterans Court noted that this limitation existed. In \textit{Ramsey v. Nicholson},\textsuperscript{350} 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.\textsuperscript{351} The relevant statute directed the VA to decide cases “in regular order according to [their] place upon the docket.”\textsuperscript{352} The veteran argued that this language required the VA to process cases in strict numeric order without granting any stays.\textsuperscript{353} The court first rejected this narrow interpretation as absurd.\textsuperscript{354} The court then acknowledged that \textit{Gardner’s Presumption} was relevant “where a veterans benefits statute is ambiguous.”\textsuperscript{355} But the court was not convinced that “the statute in question [was] a veterans benefits statute rather than a statute setting general guidance for fairness….”\textsuperscript{356}

Most recently, in \textit{Henderson v. Shinseki}, the Federal Circuit ignored \textit{Gardner’s Presumption} in a case involving a statute that was not a veterans’ benefits statute.\textsuperscript{357} 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.\textsuperscript{358} The court held that the statute could not be tolled but never mentioned

\textsuperscript{343} Id. at 1384 (Schall, C.J, dissenting).
\textsuperscript{344} Id. at 308.
\textsuperscript{345} Id.
\textsuperscript{346} In contrast, the dissent did refer to \textit{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. Brown v. Gardner, 513 U.S. 115 (1994)”).
\textsuperscript{347} Bazalo v. West, 150 F.3d, 1380, 1383 (1998).
\textsuperscript{348} Id. at 1384 n.1.
\textsuperscript{349} Id. at 1384 (Schall, C.J. dissenting).
\textsuperscript{351} Id. at 19-20.
\textsuperscript{352} Id. at 29 (quoting 38 U.S.C. § 7101(a)).
\textsuperscript{353} Id.
\textsuperscript{354} Id. at 31.
\textsuperscript{355} Id. at 35.
\textsuperscript{356} Id.
\textsuperscript{357} 589 F.3d 1201 (Fed. Cir. 2009).
\textsuperscript{358} Id. at 1203.
Gardner’s Presumption.\textsuperscript{359} Given that the statute was not a veterans’ benefits statute,\textsuperscript{360} the court correctly ignored Gardner’s Presumption. However, why the court did so is unclear; thus, we do not know whether the Federal Circuit accepts this limitation.

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’ benefits statute meant to thank and honor veterans for their service. Veterans should play no interpretive role in interpreting generally applicable statutes.

C. The Presumption Applies as an Interpretive Canon of Last Resort

Second, assuming the statute in controversy is a veterans’ benefits statute and not a generally applicable statute, then Gardner’s Presumption should be an interpretive canon of last, not first resort. In other words, Gardner’s Presumption should be relevant only when the statute is ambiguous and a court has exhausted other means for determining legislative intent.\textsuperscript{361} The courts should not apply the presumption when the statute is clear because a veteran “cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.”\textsuperscript{362} Additionally, the courts should not turn to the presumption when the statute is ambiguous unless the courts have exhausted other statutory interpretation sources, such as legislative history and purpose.

The Federal Circuit took this approach in Neilson v. Shinseki.\textsuperscript{363} The issue for the court was whether normal dental treatment could be considered a “service trauma.”\textsuperscript{364} In a VA general counsel precedent opinion, the VA interpreted “service trauma” as an injury caused by physical force rendered during military service.\textsuperscript{365} Because the VA had not interpreted this language by regulation, Chevron did not apply.\textsuperscript{366} On appeal, the veteran argued that Gardner’s Presumption should be the first place for a court to turn in the face of statutory ambiguity.\textsuperscript{367} Rejecting this argument, the Federal Circuit said, in dicta, that courts should apply Gardner’s Presumption only once all other avenues of interpretation, including Chevron, were exhausted:

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 the Brown canon. Rather, that canon is only applicable after other interpretive guidelines have been exhausted,

\textsuperscript{359} Id. at 1203-21. 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.” See King, 502 U.S. at 220 n.9, 112 S.Ct. 570; Brown v. Gardner, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). 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.

\textsuperscript{360} See section \textsuperscript{ supra}.

\textsuperscript{361} Smith v. Brown, 35 F.3d 1516, 1525-26 (Fed. Cir. 1994).

\textsuperscript{362} Id. at 1526.

\textsuperscript{363} 607 F.3d 802 (Fed. Cir. 2010).

\textsuperscript{364} Id. The facts of this case were discussed in section \textsuperscript{ supra}.

\textsuperscript{365} Id. at 805.

\textsuperscript{366} Id. at 805.

\textsuperscript{367} Id. at 808.
including *Chevron*. Here, applying other interpretive tools, we conclude that § 1712(a)(1)(C) is not ambiguous.\(^{368}\)

Applying these other interpretive tools, the court concluded that the statute was not ambiguous.\(^{369}\)

Similarly, the dissenting judges in *Carpenter v. Principi*,\(^{370}\) used this last-resort approach. Whereas the majority viewed the presumption as a canon of first resort, the dissenting judges viewed the presumption as a canon of last resort. 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.\(^{371}\) 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.”\(^{372}\) Hence, the dissents 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. Such an approach would greatly lesson the conflict between *Chevron’s* second step and *Gardner’s Presumption* for fewer statutes would be ambiguous if other avenues were first explored.

**D. The Presumption Does not Apply When *Chevron* Does Apply**

Third, if the statute in controversy is a veterans’ benefits statute and if the court has been unable to resolve the ambiguity with the traditional tools of statutory interpretation, then the court should not apply *Gardner’s Presumption* if *Chevron* applies. Simply put, *Gardner’s Presumption* should play no role in cases involving VA interpretations entitled to *Chevron* deference. This is true for two reasons.

First, neither, *Boone, Fishgold*, nor *King v. St. Vincent’s Hospital*\(^{573}\) involved an agency interpretation; hence, *Chevron* was not an issue in those cases and the courts never directly address the conflict. While *Brown v. Gardner* did involve an agency interpretation, the Supreme Court never directly addressed *Chevron*’s second step, assuming the Court applied *Chevron* at all.\(^{374}\) 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 the analysis.\(^{375}\) Admittedly, the Court indirectly

\(^{368}\) *Id.* The court cited to a number of its prior precedents as support for its assertion. *Id.* at 808, n.4 Thus, footnote four provided the following list of supporting cases: Terry v. Principi, 340 F.3d 1378, 1383-84 (Fed.Cir.2003) (finding no interpretive doubt requiring the application of *Brown* following consideration of plain language of statute and *Chevron* analysis); Nat’l Org. of Veterans’ Advocates, 260 F.3d at 1378 (turning to *Chevron* after noting that legislative history and *Brown* canon pushed in opposite directions); Jones v. West, 136 F.3d 1296, 1299 & n.2 (Fed.Cir.1998) (noting that *Brown* not applicable because statute was clear when read in conjunction with another provision); see also *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed.Cir.2003) (“The appellant argues … that *Chevron* deference is inappropriate in veterans cases such as this one, because any interpretive doubt in the context of veterans’ benefits statutes is to be resolved in the veterans’ favor…. We do not agree.” (citation omitted)); cf. *Sursely v. Peake*, 551 F.3d 1351, 1355-57 & n.5 (Fed. Cir. 2009) (turning to *Brown* after other interpretive guidelines did not resolve ambiguity)). Error! Bookmark not defined.

\(^{369}\) *Id.*

\(^{370}\) 15 Vet. App. 64 (2001).

\(^{371}\) *Id.* at 91 (Steinberg, J., concurring in part and dissenting in part).

\(^{372}\) *Id.* at 94 (Kramer, C.J., dissenting).


\(^{374}\) Indeed, the first time the Court cites *Chevron* is toward the end of the opinion, when the Court quotes another case, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993), which quotes *Chevron*. Gardner, 513 U.S. 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.

\(^{375}\) *Id.* at 118-19.
addressed *Chevron’s* second step in a footnote. 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 [was] to be resolved in the veteran’s favor.” Yet, the dictum contained in this footnote does not show a court clearly understanding that *Gardner’s* Presumption and *Chevron’s* second step conflicted and then directly resolving that conflict. Rather, the footnote appears to be more of an afterthought added as additional support for the Court’s primary reasoning. Because the Court never addressed, let alone resolved, the conflict between *Gardner’s* Presumption and *Chevron’s* second step, the Supreme Court to date has not directly addressed the question of whether *Gardner’s* Presumption should apply in the face of a contradictory agency interpretation.

Second, had the Supreme Court actually addressed the issue, it would likely have concluded that *Gardner’s* Presumption should have no role in cases involving VA interpretations entitled to *Chevron* deference because the doctrines directly collide. According to *Chevron*, agencies have the power to interpret statutes because of their expertise, because of Congress’s implied delegation to them, and because they are politically accountable. 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, not to veterans and not to the courts. If *Gardner’s* Presumption applied to cases in which *Chevron* also applied, then *Chevron’s* second step would no longer be about the reasonableness of the VA’s interpretation. Rather under the current version of *Gardner’s* Presumption, *Chevron’s* second step would become a question of which was more favorable to the veteran, the VA or the veteran’s interpretation. We know which interpretation is likely to be most veteran-friendly. Thus, the power to fill interstices in the law would belong to veterans rather than to the VA.

Perhaps for this reason, the Federal Circuit cautioned 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.” In *Sears v. Principi*, 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.” Similarly, in *Terry v. Principi*, the Federal Circuit noted that *Gardner’s* presumption “is a canon of statutory construction that requires that resolution of interpretive doubt arising from statutory language be resolved in favor of the veteran. It does not affect the determination of whether an agency’s regulation is a permissible construction of a statute.” In other words, courts should ignore *Gardner’s* Presumption when *Chevron* applies.

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375 *Gardner*, 513 U.S. at 118.
378 *349 F.3d 1326, 1331-32* (Fed. Cir. 2003).
379 *Id.* at 1331. Unfortunately, the Federal Circuit did not explain how to resolve the tension between *Gardner’s* Presumption and *Chevron’s* second step.
380 *340 F.3d 1378* (Fed. Cir. 2003).
381 *Id.* at 1384 (citing Nat’l Org. of Veterans’ Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (“Ordinarily at this juncture in the analysis-where application of the usual canons of statutory construction [i.e., canon to resolve interpretive doubt in favor of the veteran and canon to consider legislative history] push in opposite directions-we would resort to the *Chevron* principle, which mandates that we defer to an agency’s reasonable interpretation of an ambiguous statute.”).
E. The Presumption Might Apply When Chevron Does not Apply

Fourth, if the statute in controversy is a veterans’ benefits statute, and if the court has been unable to resolve the ambiguity with the traditional tools of statutory interpretation, and if Chevron is inapplicable, then Gardner’s Presumption might be appropriate. Chevron deference is inapplicable in three situations: (1) when the litigation involves private parties, (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.

First, for those cases involving private litigants, such as an employer and the veteran, then Gardner’s presumption is a fair tiebreaker. The purpose of the veterans’ statutes in general is to thank veterans for their service and help them assimilate back into society; hence, interpreting a veterans’ benefits statute to benefit veterans rather than employers and other private litigants makes sense as a statutory interpretation approach. It 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 the veterans’ job security. These are, perhaps, the easy cases.

Second, when the litigation is not between the veteran and a private party, but between the veteran and the VA 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, the Veterans Court reviewed a VA decision denying a veteran entitlement to service connected benefits for diabetes. The veteran’s service records had been destroyed in a fire, so to establish that his military service caused his diabetes, the veteran offered his written recollection of what his physician had told him. 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. The relevant statute provided: “If a claimant’s application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application.” The VA argued that it need only help veterans complete the claim form, not help them identify necessary evidence. The court rejected this argument as contrary to the plain meaning of the text. In so doing, the court referred to Gardner’s Presumption and rejected the VA’s “quite narrow” interpretation.

In this case, the VA had not, prior to the litigation, interpreted the statute in a way that deserved Chevron deference. Rather, the VA interpreted the statute during the litigation or during the events leading up to the litigation. In this situation, the court’s decision to turn to Gardner’s Presumption makes sense. There was no carefully considered agency interpretation entitled to deference. Rather, there was a position, asserted for the first time in response to the litigation. The deliberateness and carefulness of the VA’s interpretation might be suspect if developed in response to pending litigation.

383 See section __ supra.
385 Id. at 71.
386 Id. at 71, 73.
387 Id. at 77.
388 Id. (quoting 38 U.S.C. 5103(a)).
389 Id.
390 Id. at 78.
391 Id. at 77.
Third, even when the VA has interpreted a statute prior to the litigation, but did so without using force of law procedures, then Gardner’s Presumption may be a fair tiebreaker. 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.* 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. With the first two processes, Congress gave the agency the authority to issue interpretations that carry the “force of law,” and the agency used that authority to issue the particular interpretation. For this reason, these processes are considered more formal, or procedurally prescribed, while the latter processes are less formal, or less procedurally prescribed. According to three cases decided by the Supreme Court a decade ago, *Chevron* deference is appropriate (1) when Congress delegates relatively formal procedures, which the agency uses, or (2) when Congress provides other evidence that it intended courts to defer to the agency interpretation.

In all other situations, a different level of deference applies: *Skidmore* deference. 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.” 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. A court could consider Gardner’s Presumption as one part of its analysis regarding whether the VA’s reasoning was sound under *Skidmore* analysis.

The Veterans Court adopted a similar, although less clearly stated, approach in *Osman v. Peake.* In that case, the court noted that *Skidmore* deference was the appropriate standard for reviewing a VA General Counsel opinion that had interpreted a statute. 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, one based on each parent’s disability. The text of the relevant statute provided: “Each eligible person shall … be entitled to receive educational assistance.” “Person” in the statute was defined as a “child of a person who, as a result of qualifying service . . . has a


393 467 U.S. at 840.


395 Mead, 533 U.S. at 231-33.


397 As some have noted:

398 See, e.g., 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

399 Sunstein, *Step Zero,* supra note __ at 218.


401 *Id.*


403 *Id.* at 256.


405 *Id.* at 225 (quoting 38 U.S.C. § 3510).
disability permanent in nature resulting from a service-connected disability. The VA General Counsel had, prior to the case, issued a “precedent opinion” interpreting the term “eligible person” in the statute to prohibit dual awards. VA General Counsel precedent 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.

The Veterans Court reversed the VA’s denial. 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.” After reviewing the statutory language and rejecting the VA’s interpretation, the court turned to Gardner’s Presumption and noted that “[e]ven if the question were a close one, the Court is bound to find for [the veteran’s son]. In Gardner, … the Supreme court … held that any interpretive doubt with respect to the awarding such benefits ‘is to be resolved in the veteran’s favor.’” After finding the VA interpretation unpersuasive and inconsistent with the statutory language, the court rejected the VA’s interpretation entirely.

Similarly, in Sharp v. Shinseki the Veterans Court turned to Gardner’s Presumption after first finding that Skidmore, rather than Chevron, applied. After exhaustively and unsuccessfully reviewing the text and legislative history of the statutes at issue, the court said simply that the VA’s interpretation

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405 Id. (quoting 38 U.S.C. § 3501 (a)(1)(A)(i-ii)).
407 Id. at 256-57 (citing 38 U.S.C. § 7104(c)).
408 Id.
409 Id.
410 Id. at 259.
414 The facts of the case are complicated. In 1995, a VA regional office granted a veteran’s service connected claim. Id. at 269. In the letter granting the claim, the VA told the veteran that he had one year to file additional information if he wanted additional compensation benefits for his dependents and wanted those benefits to be retroactive to the date of the award; he failed to forward the information timely. Id. When the veteran did send in the additional information, the VA awarded the benefits, but because he forwarded the information after the one year deadline, the award was effective only back to the date of the late filing (January of 1997), not to the date of the original award (August 1995).
415 Id. The veteran did not appeal the additional compensation award. Id. This is the first award (the 1997 award).
416 In 1998, the VA regional office determined that the veteran was unemployable due to service-related injuries and awarded him benefits effective from the date of his injury, December of 1988. Id. The veteran challenged this award because it did not include additional compensation for his dependents retroactive to 1988. This is the second award (the 1998 award). When the regional office denied the challenge, the veteran sought Board review; however, he died while the appeal was pending. Id.
417 After the veteran died, the veteran’s wife filed for the additional compensation based on the second award. The regional office denied the request, reasoning that the first award was final and that the law did not allow for an earlier effective date once entitlement to additional compensation had been established. Id. at 270. The VA affirmed; the wife appealed to the Veterans Court. The issue before the court was whether the statute required that additional compensation benefits be awarded to dependents based on the first qualifying rating (in this case, the first award) or whether it could be based on any qualifying rating (in this case, the second award). Id. at 271. To resolve this issue, the court had to interpret two, related statutes: (1) 38 U.S.C. § 1115, which allowed for additional compensation for dependents, and (2) 38 U.S.C. § 1110(f), which established the effective date for such awards.
418 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 had held that when regulations merely parrot statutory language, Chevron is inappropriate. Sharp, 23 Vet. App. at 257 (“[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.”). Here, the Veterans Court found that the implementing regulations parroted the underlying statutory language. Id. at 274, 275. Thus, Skidmore rather than Chevron, applied. Id. at 275.
419 The court noted that the text of that section was silent regarding how the effective date for such additional compensation should be determined. Id. 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 hindered the veteran’s employment abilities.” Id. at 272 (quoting S. Rep. No. 95-1054, at 19 (1978), U.S. Code Cong. & Admin. News 1978, p. 3465). While this purpose might favor a broad interpretation of section 1115 generally, the legislative history did not specifically identify the effective date that should apply to additional compensation claims under section 1115:
was “ unpersuasive” because “the Secretary ha[d] offered no support for his position.” To resolve the ambiguity, the court turned to Gardner’s Presumption and stated that even if the VA’s interpretation were “plausible, it would be appropriate under Brown v. Gardner only if the statutory language unambiguously permitted only [that interpretation]… Because [the statute]… is ambiguous … the rule in Brown v. Gardner therefore require[d] the expansive reading of the statute.” Finding the veteran’s interpretation to be more favorable to veterans, the court reversed the VA’s determination.

The Federal Circuit seems to agree that Gardner’s Presumption is applicable only when Chevron is not. In Sursely v. Peake, the court reversed a Veterans Court’s decision affirming the VA’s decision to refuse a veteran’s request for two, separate clothing allowances. The facts of the case were noted earlier. 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: “shall pay a clothing allowance…” The Federal Circuit reversed. Because the Veteran Court’s contrary interpretation suggested ambiguity, the Federal Circuit reviewed the enactment history and mentioned Gardner’s Presumption. Specifically, the court noted that in the face of statutory ambiguity, it had to apply Gardner’s Presumption. Importantly, the court noted in a footnote that because Chevron was inapplicable, the court could consider Gardner’s Presumption.

Thus, while Gardner’s Presumption should have no application when the VA has interpreted a statute in a manner entitling that interpretation to Chevron deference, Gardner’s Presumption may be appropriate when Chevron does not apply. Chevron does not apply when an agency is not a litigant, when an agency has not offered an interpretation prior to the litigation, and when an agency interprets an ambiguous statute without using force of law procedures.

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 section 1115 benefits should accrue whenever the statutory factors were met. Id. In other words, although the statute did not explicitly so provide, the court concluded that whenever a veteran met section 1115’s criteria, the veteran’s dependents were impliedly entitled to additional compensation. Id. 415 Id. at 275.

416 Id. (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).

417 Id. (citing Sursely, 551 F. 3d 1352, 1357 (Fed. Cir. 2009)).

418 Id.

419 551 F. 3d 1352 (Fed. Cir. 2009).

420 See text accompanying notes supra. In short, the relevant statute authorized clothing allowances for disabled veterans who use prosthetic or orthopedic appliances that wear out or tear clothing. 22 Vet. App. at 23. The veteran had two, separate disabilities, so he requested two, separate clothing allowances. Id.

421 Id. at 23 (referring to 38 U.S.C. §1162 (2003) (emphasis added)).

422 Id. at 1356.

423 As to the enactment history, originally, the statute had permitted clothing allowances for individuals using “a prosthetic or orthopedic appliance or appliances.” Id. (quoting Veterans’ Compensation and Relief Act of 1972, Pub. L. No. 92-328, § 103, 86 Stat. 393, 394). 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. at 1367.

424 Id. at 1357.

425 Id.

426 Id. (stating, “we 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.”).
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. Further, courts should apply Gardner’s Presumption only when statutes are ambiguous after all the traditional tools of statutory interpretation have been applied. Finally, courts should return Gardner’s Presumption 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. Gardner’s Presumption morphed well beyond its humble beginnings.

F. The Presumption Applies to the VA not to the Court.

Finally, one alternative way to resolve the tension between Gardner’s Presumption and Chevron’s second step would be to view the duty to “resolve interpretive doubt in the veteran’s favor” as a duty belonging to the VA and not as an interpretive tool belonging to the courts. The VA must provide adequate written reasons for its findings and conclusions of law and fact so that the veteran claimant can understand the basis for VA’s decision and so that the Veterans Court can review that decision. The VA could be expected to include information regarding whether it considered Gardner’s Presumption during its decision-making process. The courts could then evaluate whether the VA met this duty when the courts apply either the second step of Chevron deference or Skidmore deference. In other words, one test of the reasonableness or persuasiveness of the VA’s interpretation would be whether the VA considered Gardner’s Presumption.

The Veterans’ Court actually suggested this approach in Cottle v. Principi. In that case, the VA General Counsel acknowledged that a statute could be read broadly to cover the veteran’s injury, but admitted choosing to interpret the statute narrowly in her Precedent Opinion. The court rejected her interpretation and chastised her for “fail[ing] to discuss or consider Gardner at all.” The court stressed that Gardner’s Presumption required the VA to “resolv[e] any interpretative doubt in favor of the veteran….” While not exactly correct, the court’s direction provides one possible solution to the conflict.

Other courts have also toyed with this approach. For example, in Smith v. Nicholson, the Veterans Court chided the VA for failing “to consider and apply, as appropriate, the basic canon of construction that ‘interpretive doubt is to be resolved in the veteran’s favor’ when a regulatory term is found to be ambiguous….” Similarly, in Ross v. Peake, Judge Kasold dissented from an order denying full-Court consideration of a panel decision. In his dissent, Judge Kasold chastised the VA for failing to consider and discuss Gardner’s Presumption. Finally, in Jones v. Principi, the court

431 Id. at 336.
432 Id. at 336.
433 Id.
435 Id. at 73.
437 Id. at 536 (citing Ross v. Peake, 21 Vet. App. 528 (2008)).
438 Id.
remanded the case, specifically directing the VA to evaluate the role that Gardner’s Presumption should play in the VA’s decision.  

While placing the duty on the VA rather than leaving the option 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 take into account 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 under Chevron’s second step. In other words, placing the burden on the VA may not eliminate the conflict between Gardner’s Presumption and Chevron’s second step.

**Conclusion**

Gardner’s Presumption morphed from a simple directive to courts to construe veterans’ benefits statutes liberally to a veterans’ trump card in which the VA must always lose the interpretive battle. Today, Gardner’s Presumption is a canon of interpretation that directs courts to resolve all interpretive doubt in a veteran’s favor. Yet Gardner’s Presumption directly conflicts with Chevron’s second step, which directs courts to adopt an agency’s reasonable interpretation of ambiguous statutes. 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 simply cannot coexist harmoniously. 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. In the last analysis, if guidance from the Supreme Court is not forthcoming soon, the courts will have to resolve this issue themselves.

This article identifies the conflict and offers three ways for the lower courts to resolve it. First, and regardless of which resolution is ultimately selected, Gardner’s Presumption must 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 veterans, the precursor to Gardner’s Presumption merely directed courts to construe ambiguous veterans’ benefits statutes liberally. Returning Gardner’s Presumption to its humble beginnings would eliminate most of the conflict between Gardner’s Presumption and Chevron’s second step.

Second, the courts should apply Gardner’s Presumption in very limited situations and in a new way. Specifically, courts should apply Gardner’s Presumption only when the statute at issue addresses veterans’ benefits, only when the statute is truly ambiguous, and only when the VA has not already interpreted the statute in a way that entitles the VA to Chevron deference. In all other cases, Gardner’s Presumption should be ignored.

Third, and alternatively, Gardner’s Presumption could be viewed as a duty belonging to the VA rather than as an interpretive canon belonging to the courts. With this approach, whether the VA
considered Gardner’s Presumption, whatever its formulation, when the VA interpreted a statute would be just one factor for a court to consider when applying either Chevron’s second step or Skidmore deference.