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ARTICLE

THE COMMON LAW SOLUTION TO *GARDNER'S* PRESUMPTION

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The Common Law Solution to *Gardner's* Presumption

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INTRODUCTION

In *Johnson v. McDonald*,² Mr. Marvin O. Johnson, a Veteran, brought a claim before the United States Court of Appeals for the Federal Circuit (Federal Circuit), alleging the Department of Veterans Affairs (VA) Regional Office (RO), the Board of Veterans' Appeals (BVA), and the Court of Appeals for Veterans Claims (CAVC) incorrectly denied his benefits claims for extra-schedular consideration of his service-connected disabilities.³ Mr. Johnson argued that because the combined effects of his service-connected disabilities were not adequately captured in his individual disability ratings, he was eligible for extra-schedular compensation.⁴ VA first argued that the clear language of the regulation did not require VA to aggregate all service-connected disabilities into the extra-schedular disability analysis.⁵ Alternatively, VA contended that if the regulation was ambiguous, then the agency's interpretation—that VA need only consider the disability on appeal in the extra-schedular analysis—should prevail under normal standards of agency deference.⁶

Finding the regulation unambiguous and VA's interpretation wrong, the Federal Circuit held for Mr. Johnson.⁷ The Federal Circuit decided that VA incorrectly interpreted its regulation, and that the plain meaning of the regulation required VA to consider all service-connected disabilities when determining if a veteran qualified for extra-schedular compensation.⁸ As the court found the regulation unambiguous, it accorded the agency's interpretation no deference.⁹

Judge O'Malley, concurring with the majority, wrote separately to discuss the conflict inherent in veterans' law between *Gardner's* Presumption—a canon of interpretation holding that interpretive doubt should be resolved in favor of the veteran—and traditional canons of agency deference. As Judge O'Malley stated, “[w]here there is a conflict between an agency’s reasonable interpretation of an ambiguous regulation and a more veteran-friendly interpretation, it is unclear which interpretation controls.”¹⁰ The Judge agreed with the majority that as the statute was unambiguous, determining the appropriate deference did not come into play; she wrote only to acknowledge the conflict between *Gardner's* Presumption and agency deference and to plead for guidance from the Supreme Court.¹¹

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² 762 F.3d 1362 (Fed. Cir. 2014).

³ *Id.* at 1363. The Department of Veterans Affairs (VA) has a schedule of disability ratings which corresponds to the extent of a veteran's incapacitation. In some instances, the schedule of disabilities cannot adequately compensate a veteran for the disability from which he or she suffers. Thus, in “exceptional cases,” veterans may be eligible for an extra-schedular disability rating under VA regulation 38 C.F.R. § 3.321(b)(1). The regulation states that “[t]o accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities.” 38 C.F.R. § 3.321(b)(1) (2015).

⁴ *Johnson*, 762 F.3d at 1363.

⁵ *Id.*

⁶ *Id.* at 1363-64.

⁷ *Id.* at 1366.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1367.

¹¹ *Id.* at 1366-67.

Gardner's Presumption is named after a 1994 Supreme Court case, *Brown v. Gardner*,¹² in which the Court noted in dicta that “interpretive doubt is to be resolved in the veteran’s favor.”¹³ The proper application of *Gardner's* Presumption, however, is a matter of debate.¹⁴ The conflict discussed by Judge O’Malley refers to the tension between *Gardner* and principles of agency deference, which generally hold that courts grant deference to agencies in their interpretation of ambiguous statutes and regulations because of the agencies’ subject-matter expertise.¹⁵ *Gardner's* Presumption, on the other hand, holds that the benefit of interpretive doubt in parsing statutes and regulations is to be given to the veteran. Judge O’Malley is not alone in recognizing this conflict. Numerous judges and commentators have called for the Supreme Court to weigh in and resolve this controversy.¹⁶

But while there is a legitimate jurisprudential and conceptual problem that arises from the conflict between *Gardner's* Presumption and agency deference, whether the conflict causes real problems, in practice, is another question.¹⁷ If *Gardner's* Presumption is truly a threat to established principles of agency deference, as Professor Linda Jellum argues, one would expect to find a multitude of cases in which *Gardner's* Presumption trumps VA’s reasonable interpretations of ambiguous statutes or regulations.¹⁸ And yet that is not the case.¹⁹ Or at least it is not anymore. In the past five years, only two Veterans have prevailed at the CAVC or Federal Circuit level because of *Gardner's* Presumption in situations where the agency should have won due to agency deference.²⁰ In the past 10 years, only two Veterans have prevailed because of *Gardner's* Presumption at the Federal Circuit.²¹ Thus, although the conflict between *Gardner's* Presumption and agency deference is no less conceptually fraught, it has become less and less problematic in the actual practice of veterans’ law.

¹² 513 U.S. 115 (1994).

¹³ *Id.* at 118.

¹⁴ See DeBeaord v. Principi, 18 Vet. App. 357, 368 (2004) (stating that “we are not called upon to address the appellant’s argument that any ambiguity in section 1160(a)(1) should be resolved in his favor . . . or to consider the application of the doctrine of *Gardner* . . . regarding resolving ‘interpretive doubt’ . . . [i]n the last analysis, guidance from the Supreme Court would appear necessary to resolve this matter definitively”); Michael P. Allen, *Commentary on Three Cases from the Federal Circuit and the Court of Appeals for Veterans Claims As We Approach Twenty-Five Years of Judicial Review of Veterans’ Benefits*, 5 VETERANS L. REV. 136, 161 (2013) (discussing the unwillingness of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) to use *Gardner's* Presumption and the need for the Supreme Court to weigh in and resolve the conflict); James D. Ridgway, *Changing Voices in a Familiar Conversation about Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175, 1185 (2012) [hereinafter Ridgway, *Changing Voices*] (discussing the conflict between *Gardner's* Presumption and *Chevron* within the context of the debate between rules versus standards); Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner’s Presumption that Interpretive Doubt Be Resolved in Veterans’ Favor with Chevron*, 61 AM. U. L. REV. 59, 61 (2011) (discussing the conflict between *Gardner's* Presumption and *Chevron*); see, e.g., Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (noting that when faced with ambiguous statutes, courts should hold for the veteran because of *Gardner's* Presumption); McGee v. Peake, 511 F.3d 1352, 1357-58 (Fed. Cir. 2008) (mentioning *Gardner's* Presumption and holding for the Veteran); Chandler v. Shinseki, 24 Vet. App. 23, 30-31 (2010) (finding for the Veteran due to *Gardner's* Presumption and the Secretary’s “absurd” interpretation of the statute); Sharp v. Shinseki, 23 Vet. App. 267, 275 (2009) (finding for the Veteran under *Gardner's* Presumption as the regulation was ambiguous and the Secretary’s interpretation unpersuasive); Osman v. Peake, 22 Vet. App. 252, 259 (2008) (stating that in a close call, the Court of Appeals for Veterans Claims (CAVC) would find for the Veteran because of *Gardner's* Presumption); Hartness v. Nicholson, 20 Vet. App. 216, 221-22 (2006) (holding for the Veteran because of *Gardner's* Presumption when faced with an ambiguous regulation).

¹⁵ Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 865-68 (2006).

¹⁶ See sources cited *supra* note 14.

¹⁷ See *infra* Section III.

¹⁸ Jellum, *supra* note 14, at 61.

¹⁹ See *infra* Section III.

²⁰ Taylor v. Shinseki, No. 10-2588, 2012 WL 2218714, at *4 (Vet. App. June 18, 2012) (holding that “[t]o the extent that the scope of this Diagnostic Code is ambiguous, that ambiguity must be resolved in the veteran’s favor”); Chandler v. Shinseki, 24 Vet. App. 23, 30-31 (2010) (holding that the Secretary’s interpretation would lead to absurd results under the law, so as the regulation is ambiguous, *Gardner's* Presumption directs the court to rule in favor of the veteran).

²¹ Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (holding that because the statute is ambiguous, interpretive doubt is to be resolved in the Veteran’s favor); McGee v. Peake, 511 F.3d 1352, 1357-58 (Fed. Cir. 2008) (mentioning *Gardner's* Presumption and finding for the Veteran).

Residing in the background of this jurisprudential conflict is VA itself.²² VA's stated mission is to fulfill President Lincoln's promise, "[t]o care for him who shall have borne the battle, and for his widow, and his orphan by serving and honoring the men and women who are America's veterans."²³ Accordingly, and rightly, the veterans' benefits system was designed to be as user-friendly and accommodating as possible.²⁴ VA, for example, is charged with interpreting veterans' benefits claims liberally; VA may not appeal any grant of veterans' benefits at the RO or BVA level; numerous provisions compel VA to assist veterans in presenting claims, accumulating evidence, and receiving benefits; statutes of limitation do not apply to veterans bringing disability claims;²⁵ and veterans can appeal claims with a minimum amount of effort and paperwork. Indeed, due to the navigability of the system, very few benefit applicants seek the help of a private attorney.²⁶ It is this agency—an agency of 350,000 employees serving a population of approximately 21.8 million living veterans—that courts rule against if *Gardner's* Presumption comes into play.

This Article demonstrates that since the publication of Professor Jellum's article, the jurisprudential landscape has changed, and *Gardner's* Presumption—while certainly still an abstract legal conflict—is no longer the problem it once was. However, this Article also provides an explanation, in line with Professor Jellum's analysis, of the conflict between agency deference and *Gardner's* Presumption and the theoretical and legal problems it still generates.

Section I discusses the origins of *Gardner's* Presumption and illustrates its evolution from a broad directive to interpret remedial statutes liberally in favor of veterans into a command to interpret ambiguity in favor of veteran-litigants. Section II begins with a discussion of the different variations of agency deference, and explains why courts defer to agency expertise. Section III discusses the ways in which the Federal Circuit and CAVC first recognized the conflict in the early 1990s and 2000s. Section IV analyzes the CAVC and Federal Circuit case law of the past five years to find that only two Veterans have prevailed because of *Gardner's* Presumption in situations in which the agency should have prevailed due to agency deference. Section V discusses the problems that *Gardner's* Presumption would cause if frequently utilized by the Courts. Section VI presents a solution: taking *Gardner's* Presumption out of the courts and placing it under the auspices of VA.

²² For a complete history of VA, see generally James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011) [hereinafter Ridgway, *The Splendid Isolation Revisited*].

²³ *Mission, Vision, Core Values & Goals*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.va.gov/about_va/mission.asp (last visited Sept. 29, 2016).

²⁴ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"); *Smith v. Brown*, 35 F.3d 1516, 1522 (Fed. Cir. 1994) (noting the "uniquely pro-claimant principles underlying the veterans' benefits dispensation scheme"); Shera Finn et. al., *VA's Duty to Assist in the Context of PTSD Stressor Verification: What Must VA Do to Fulfill the Veterans Claims Assistance Act of 2000?*, 1 VETERANS L. REV. 50, 111, 150-51 (2009) (discussing the paternalistic and uniquely pro-claimant aspects of the VA's beneficiary system).

²⁵ Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 78 (2010); see 38 U.S.C. §§ 5103, 5103A (2012); *Jarvis v. West*, 12 Vet. App. 559, 561-62 (1999); 38 C.F.R. § 3.159 (2015).

²⁶ Matthew J. Dowd, *No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. § 5904(c)*, 16 FED. CIR. B.J. 53, 72 (2006); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 133 (2009) (stating that in recent years attorneys are present in only 5 to 7.5% of BVA decisions). The absence of lawyers is partly attributed to historical causes. Before the Equal Access to Justice Act, attorneys received next to no remuneration for representing veterans. Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2, 6-14 (2009) (discussing the history of attorney representation before VA). After passage of this Act, however, attorneys now receive fees and expenses if they prevail. 28 U.S.C. § 2412(d)(1), (2)(F) (2012) (setting forth requirements for attorney fees and expenses).

I. THE EVOLUTION OF *GARDNER'S* PRESUMPTION

Gardner's Presumption,²⁷ as defined today, bears little resemblance to its original formulation as a broad directive to interpret veterans' benefits statutes liberally. Today, the presumption is understood as a sort of tie-breaker—i.e., as a directive to interpret ambiguity in a given statute, regulation, or other agency interpretation in favor of a veteran in the context of litigation.²⁸ A closer look at the citations that support the key language in *Gardner*, however, reveals that the current form of *Gardner's* Presumption does not necessarily follow from the ideas and principles that preceded it.

Gardner's Presumption originated in a trifecta of Supreme Court cases: *Boone v. Lightner*,²⁹ *Fishgold v. Sullivan Drydock & Repair Corp.*,³⁰ and *King v. Saint Vincent's Hospital*.³¹ In each case, culminating in *Gardner*, the Supreme Court's understanding of the charge that interpretive doubt favors the veteran evolved substantially—and perhaps not in keeping with precedent.³²

A. Cases Predating *Gardner*: *Boone* and *Fishgold*

The oldest ancestor of *Gardner's* Presumption is *Boone v. Lightner*. In *Boone*, a 1943 Supreme Court case, the statute at issue was the Soldiers' and Sailors' Civil Relief Act of 1940³³—importantly, not a statute or regulation implemented or interpreted by VA.³⁴ Mr. Boone, a Captain in the United States Army, was stationed in Washington, D.C., when a state court in North Carolina summoned him into court to account for his actions as trustee of his daughter's trust.³⁵ The day he received the summons, Mr. Boone switched his residence of domicile from North Carolina to Washington, D.C.³⁶ On the day of the trial, Mr. Boone cited the Soldiers' and Sailors' Civil Relief Act of 1940 in support of his request for a continuation of the trial until after he had concluded his service in Washington, D.C.³⁷ Yet before the trial, he had submitted pleadings, affidavits, and depositions, and at trial his counsel was present.³⁸ The state court denied the motion, and the trial ensued in Mr. Boone's absence.³⁹ Mr. Boone appealed to the Supreme Court.

The Court determined that allowing a continuance for a trial in North Carolina while the enlistee was stationed nearby in Washington, D.C., under the circumstances of the case, was not the intended purpose of the statute, finding that “[t]he Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service.”⁴⁰ The Court reasoned that “[t]he Soldiers’

²⁷ See *infra* Section III.

²⁸ See *Hudgens v. Gibson*, 26 Vet. App. 558, 565-68 (2014) (Kasold, C.J., dissenting in part and concurring in part) (discussing the use of *Gardner's* Presumption when the regulation or statute is ambiguous); *Pacheco v. Gibson*, 27 Vet. App. 21, 36-42 (2014) (Lance, J., concurring in part and dissenting in part) (discussing the use of *Gardner's* Presumption when the regulation or statute is ambiguous).

²⁹ 319 U.S. 561 (1943).

³⁰ 328 U.S. 275 (1946).

³¹ 502 U.S. 215 (1991); see also *Jellum*, *supra* note 14, at 65-66.

³² *Jellum*, *supra* note 14, at 65-66 (discussing the evolution of *Gardner's* Presumption from “its humble beginnings as a liberal construction canon to its current formulation as a tie-breaking trump card”).

³³ Pub. L. No. 76-861, 54 Stat. 1178.

³⁴ *Boone*, 319 U.S. at 561.

³⁵ *Id.* at 562.

³⁶ *Id.*

³⁷ *Id.* at 563-64.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 568.

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* . . . [b]ut in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use."⁴¹ Thus, while the Court announced that the statute was to be interpreted liberally, it qualified that directive by stating such liberal interpretations should be employed only if the circumstances warranted.⁴²

Applying this rationale to the facts of the case, the Court found against Mr. Boone, stating that he was attempting to manipulate the situation to avoid going to trial for reasons unconnected to military service.⁴³ Thus, the Court held, courts should, when appropriate, give soldiers the fullest protection allowed under the statute, while still abiding by the true spirit of the statute.⁴⁴ Of note for our purposes is that *Boone* was a case between two private parties; as the VA played no role, the Court did not need to discuss agency deference at all. Thus, the precursor to *Gardner's* Presumption conflicted not at all with agency deference.

Fishgold v. Sullivan Drydock & Repair Corporation, a 1946 Supreme Court case, followed *Boone* and featured similar facts. The statute in question in *Fishgold* was the Selective Training and Service Act of 1940⁴⁵—again, not a statute implemented or interpreted by VA.⁴⁶ The statute was designed, the Court explained, “to protect the veteran in several ways,” by ensuring that a veteran who was “called to the colors was not to be penalized on his return by reason of his absence from his civilian job.”⁴⁷ In other words, the Selective Training and Service Act of 1940 guaranteed veterans the right to return to the job they had held immediately prior to their military service.⁴⁸

The Veteran-litigant in *Fishgold* worked at a shipyard from 1942 until 1943, when he entered the United States Army.⁴⁹ After more than one year of service, he was honorably discharged.⁵⁰ He returned to his former position as a welder 40 days after his discharge and was re-employed on August 25, 1944.⁵¹ In the spring of 1945, however, business was slow, and the employer, pursuant to an applicable collective bargaining agreement, temporarily laid off numerous employees, including the Veteran, for several days.⁵² The Veteran sued under the Selective Training and Service Act of 1940, claiming that his reinstatement rights had been violated.⁵³

At the beginning of its discussion, the Court, quoting *Boone v. Lightner*, reiterated that “[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”⁵⁴ The Court further noted that it was necessary to “construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit

⁴¹ *Id.* at 575 (emphasis added).

⁴² *Id.* (explaining that courts should assist veterans when warranted).

⁴³ *Id.* at 572.

⁴⁴ *Id.*

⁴⁵ Pub. L. No. 76-783, 54 Stat. 885.

⁴⁶ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

⁴⁷ *Id.*

⁴⁸ *Fishgold*, 328 U.S. at 278.

⁴⁹ *Id.* at 277-78.

⁵⁰ *Id.* at 278.

⁵¹ *Id.*

⁵² *Id.* at 279.

⁵³ *Id.* at 280.

⁵⁴ *Id.* at 285.

of the veteran as a harmonious interplay of the separate provisions permits.”⁵⁵ In other words, in keeping with the message articulated in *Boone*, veterans’ benefits statutes should be construed broadly to protect veterans, provided a broad construction is in keeping with the statute’s purpose.⁵⁶ The Court, however, gave no explanation for this statement, nor did it articulate how this new language affected the remedial statute in question.⁵⁷ In a long analysis, the Court found against the Veteran.⁵⁸ It concluded that the Act did not prevent temporary lay-offs due to lack of work and that the Veteran-employee had been restored to a position with a seniority status that he would have been at had he not left, in keeping with the language of the Act.⁵⁹ Again, it is notable that this case involved a dispute between a veteran and a private party; VA was not a party in this matter, and agency deference was, accordingly, not in issue because agency deference can only come into play if the agency is a party to the case. The Court, in dicta, stated that veterans should receive the benefit of liberal statutory construction but then proceeded to, as in *Boone*, find against the Veteran.⁶⁰

Traditional principles of agency deference coexist harmoniously with *Boone* and *Fishgold* because, in both cases, the VA was not a party to the suit. Therefore, agency deference did not come into play.⁶¹ Accordingly, the first two *Gardner's* Presumption cases did not conflict with traditional judicial deference to agencies.⁶²

B. King’s Morph into a Veterans Presumption

In *King v. St. Vincent’s Hospital*, the Supreme Court greatly strengthened the presumption in favor of veterans.⁶³ In this case, Mr. King, an employee of St. Vincent’s hospital, informed the hospital he required a three-year leave of absence, in accordance with the Veterans’ Reemployment Rights Act,⁶⁴ to fulfill his duties as sergeant major in the Active Guard/Reserve program for Alabama.⁶⁵ The

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ It was, and remains, a canon of interpretation that all remedial statutes are to be construed liberally. Professor Jellum makes the interesting point that *Boone’s* command to interpret the statute liberally is very similar to the normal principles of interpreting remedial statutes liberally. Jellum, *supra* note 14, at 67-68 (“Those familiar with statutory interpretation have likely already noted the similarity of *Boone’s* interpretive canon with an oft-repeated canon of interpretation that instructs that remedial statutes should be construed liberally to further their ‘remedial’ purposes. *Boone’s* interpretive canon is similar, if not identical, to the remedial interpretation canon, likely because veterans’ benefits statutes are remedial. Remedial statutes correct or remedy existing statutes, create new rights, or expand remedies that were otherwise unavailable at common law. Hence, the Court’s development of and lack of explanation for *Boone’s* interpretive canon is, perhaps, unsurprising. Yet, in neither *Boone* nor *Fishgold* did the Court mention the remedial canon as its basis for creating *Boone’s* interpretive canon. It is therefore unclear whether the Court believed that liberal interpretation was appropriate simply because veterans’ benefits statutes are remedial in nature or for some other, unstated reason.”).

⁵⁸ *Fishgold*, 328 U.S. at 288 (finding no support for the soldier’s claim that the Court should reinstate him at the welding company).

⁵⁹ *Id.* at 289.

⁶⁰ Compare the results in *Boone* with the results in *Fishgold*, for in both instances, the Court found against the Veteran. Compare *Boone v. Lightner*, 319 U.S. 561, 575 (1943), with *Fishgold*, 328 U.S. at 288-89.

⁶¹ Jellum, *supra* note 14, at 70 (“Up and until the time *King* was decided, *Boone’s* interpretive canon had been applied only in cases involving individual litigants arguing about the interpretation of a statute. No agency interpretations were involved because VA benefit decisions were not yet reviewable. Thus, from the time the Supreme Court created *Boone’s* interpretive canon in 1943 until the time that Congress created the Veterans Court in 1988, no court applied the canon in a case in which a veteran and the VA disputed the interpretation of a statute. With the arrival of *Chevron* deference in 1984 and the creation of judicial review of VA decisions in 1988, the landscape changed.”).

⁶² *Id.* at 69 (explaining that the first two cases involved private parties disputing a statute’s meaning; with private parties, agency deference does not come into play).

⁶³ *Id.* at 69-70 (stating that “in *King*, the Court changed *Boone’s* interpretive canon from a liberal construction canon into a command that courts construe such statutes ‘in the [veterans’] favor’” (alteration in original)).

⁶⁴ 38 U.S.C. § 2024(d) (2012).

⁶⁵ *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 217 (1991).

hospital decided that a three-year leave of absence was unreasonable and did not grant it.⁶⁶ The case ended up at the Supreme Court, where the Court found the statute silent in regards to the permissible length of absence for which employees were still guaranteed jobs.⁶⁷ The Court then held for the Veteran, reasoning that, as the statute placed no clear conditions on length of absence, it operated to protect the soldier for his entire absence.⁶⁸

In dicta (and in a footnote), the Court mentioned that even if the employer could proffer a reasonable argument in its favor, the Court would still find for the Veteran: “Even if the express examples unsettled the significance of subsection (d)’s drafting, however, we would ultimately read the provision in King’s favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.”⁶⁹ In support of this statement, the Court cited *Fishgold*.⁷⁰

Yet *King*’s holding far surpasses *Fishgold*. Its directive is more favorable to veteran-litigants than the *Fishgold* and *Boone* directive to “interpret statutes broadly,” for it is one thing to say that a statute must be interpreted broadly, and quite another to say that the statute must be interpreted *in favor of its beneficiary*.⁷¹ And the Court’s citation to *Fishgold* in support of this statement is odd—or, to put it more bluntly, inaccurate—given that *Fishgold* did not endorse such a strong formulation.⁷²

As is true with *Boone* and *Fishgold*, *King* did not present a conflict between the Veteran-litigant’s interpretation and the agency’s interpretation.⁷³ Accordingly, the conflict between agency deference and the new, “super-strong”⁷⁴ presumption was not yet clearly defined.⁷⁵ In fact, it was two years before the Supreme Court would decide *Brown v. Gardner*, in which the problematic nature of *King*’s super-strong presumption would become clear.

C. *Brown v. Gardner*

In 1994, the Supreme Court heard the case of Mr. Gardner, a Korean War Veteran who had undergone surgery at a VA facility; the surgery resulted in unexpected weakness in Mr. Gardner’s left calf, ankle, and foot.⁷⁶ Mr. Gardner claimed disability benefits under 38 U.S.C. § 1151, a statute which provides compensation to veterans for injuries that occur as the result of a hospitalization with VA. Both the RO and BVA denied the claim and appeal, stating that “injuries,” as contemplated by 38 U.S.C. § 1151, were only covered under the statute if VA was at fault.⁷⁷ The CAVC reversed; the Federal Circuit affirmed the CAVC’s reversal, and VA appealed to the Supreme Court.⁷⁸

⁶⁶ *Id.*

⁶⁷ *Id.* at 220.

⁶⁸ *Id.* at 222.

⁶⁹ *Id.* at 220 n.9.

⁷⁰ *Id.*

⁷¹ In *King*, for the first time, the Court commanded future courts to construe statutes in the veterans’ favor instead of simply interpreting statutes liberally for the benefit of veterans. Jellum, *supra* note 14, at 69; *see also* discussion *supra* Section II.a.

⁷² *Fishgold*, rather, held that statutes should be interpreted liberally for the benefit of veterans. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

⁷³ *King* involved a member of the armed forces and a hospital, two private entities. *King*, 502 U.S. at 216.

⁷⁴ Jellum, *supra* note 14, at 70 (pointing out that “*Boone*’s morph into a super-strong presumption thus started as dictum in this footnote from *King*”).

⁷⁵ The conflict between the super-strong presumption and agency deference was not recognized by the CAVC until 2002 in *Jordan v. Principi*, 16 Vet. App. 335 (2002), and not recognized by the Federal Circuit until 2000 in *Boyer v. West*, 210 F.3d 1351 (Fed. Cir. 2000).

⁷⁶ *Brown v. Gardner*, 513 U.S. 115, 116 (1994).

⁷⁷ *Id.* at 119.

⁷⁸ *Id.*

The Court determined the statute to be unambiguous and further found that it supported the Veteran's interpretation.⁷⁹ Then, in dicta (and once again in a parenthetical), the Court stated that even if it were to find the statute ambiguous, "interpretive doubt is to be resolved in the veteran's favor."⁸⁰ In support of that statement, the Court cited to the footnote in *King*, which, as noted previously, cited *Fishgold*.⁸¹

As with *King*, the cases the Court cited did not support the statement that interpretive doubt *within the context of Mr. Gardner's case* should be resolved in his favor.⁸² In *Boone*, the Supreme Court, in passing, stated that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."⁸³ In *Fishgold*, similar language appeared: citing *Boone*, the Court stated that legislation meant to assist veterans "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."⁸⁴ *King* was more veteran-litigant friendly, declaring in a footnote that statutes for veterans should be construed in favor of veterans.⁸⁵ But given that *King* did not involve a dispute over a VA interpretation, *Gardner* (which did involve such a dispute) greatly expanded *King's* holding and flew in the face of principles of agency deference.

Gardner, to say the least, was the result of a jurisprudential evolution that was not convincingly grounded in precedent or recognition that the Court's actions were in conflict with principles of agency deference. As Professor Jellum states, "[t]he Court thus transformed *Boone's* interpretive canon from a directive to courts to interpret veterans' benefits statutes liberally into a directive to courts to resolve any interpretive doubt in the veteran-litigant's favor—even in the face of a contrary agency interpretation."⁸⁶ Thus, the conflict between agency deference and *Gardner* is clear: it is impossible to give deference to both a veteran's interpretation and VA's interpretation, when the interpretations are in conflict.

II. VARIATIONS OF AGENCY DEFERENCE THAT CONFLICT WITH *GARDNER'S* PRESUMPTION

Courts grant proportionate levels of deference to agency interpretations, depending on whether the interpretation concerns a statute, regulation, or other form of agency-issued guidance. Administrative law jurisprudence offers at least eight different constructions of agency deference.⁸⁷ For the purposes of this Article, only three agency deference principles are important. All three are discussed below.

⁷⁹ *Id.* at 118.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² The situation in *Gardner* was vastly different from the situation in *King*, for in *Gardner* the Court was finding in favor of the Veteran against VA. In *King*, the Veteran opposed a private party and there was no VA interpretation at issue.

⁸³ *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

⁸⁴ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone*, 319 U.S. at 575).

⁸⁵ *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 & n.9 (1991).

⁸⁶ Jellum, *supra* note 14, at 73.

⁸⁷ See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098-117 (2008) (explaining the different types of deference).

A. *Seminole* Deference: Agency Interpretations of Their Own Regulations & Regulatory Schemes

The Supreme Court held in *Bowles v. Seminole Rock & Sand Co.*⁸⁸ that an agency interpretation of its own properly issued regulation⁸⁹ is “controlling . . . unless it is plainly erroneous or inconsistent with the regulation.”⁹⁰ In other words, *Seminole* established that when an agency formally adopts an interpretation of a regulation previously issued by the agency, the agency interpretation controls unless the interpretation is plainly inconsistent with the regulation at issue.⁹¹

In 1994 the Court extended *Seminole* deference in *Thomas Jefferson University v. Shalala*.⁹² In that case, the Department of Health and Human Services had issued a complicated regulatory scheme, followed by interpretations explaining that scheme.⁹³ The Court held that agency interpretations interpreting regulatory schemes, as well as regulations themselves, deserved *Seminole* deference.⁹⁴ Similarly, in the 1997 case of *Auer v. Robbins*,⁹⁵ the Court found that the Department of Labor was entitled to *Seminole* deference when it articulated a legal concept that was a “creature of the [agency’s] own regulations.”⁹⁶ Thus, when agencies interpret their own regulations and regulatory schemes, they are entitled to *Seminole* deference in the event such interpretations are challenged.⁹⁷

B. *Chevron* Deference: Agency Interpretations of Ambiguous Statutes

Chevron deference is the most common and well-known form of judicial deference to agency interpretations.⁹⁸ In *Chevron*, the Supreme Court explained that agencies are experts at interpreting their own statutes and know better than judges how to best serve agency constituencies.⁹⁹ Thus, when a court is faced with a challenge to an agency’s promulgation of its own legally binding rule or order, the court should first determine whether or not the statute is ambiguous.¹⁰⁰ If the statute is clear (i.e., unambiguous), then the court must uphold the statute regardless of the agency’s interpretation of it.¹⁰¹ On the other hand, if the statute is ambiguous, then the court must accept any “reasonable” agency

⁸⁸ 325 U.S. 410 (1945).

⁸⁹ See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1460-67 (2011), for an extensive conversation on the notice and comment procedures necessary for agencies to issue proper regulations.

⁹⁰ *Bowles*, 325 U.S. at 414.

⁹¹ Eskridge & Baer, *supra* note 87, at 1103 (explaining that *Seminole Rock* deference stands for strong deference for agency interpretation of its own regulations).

⁹² 512 U.S. 504, 512 (1994) (upholding the Department of Health and Human Services’ interpretation of its own complicated Medicare regulations).

⁹³ *Id.* at 510-12.

⁹⁴ *Id.*

⁹⁵ 519 U.S. 452 (1997).

⁹⁶ *Id.* at 461, 463 (upholding the Department of Labor’s interpretation of its own regulatory concept embodied in Fair Labor Standards Act regulations).

⁹⁷ “[T]he Court sometimes declines to apply *Seminole Rock* deference when this agency has changed its interpretation, perhaps suggesting opportunism rather than a law-like deployment of detailed regulations.” Eskridge & Baer, *supra* note 87, at 1104; *see also* *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 356 (2000); *Comm’r v. Schleier*, 515 U.S. 323, 334 n.7 (1995); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 673 n.9 (1988).

⁹⁸ Eskridge & Baer, *supra* note 87, at 1085 (explaining the *Chevron* revolution and its popularity with courts and litigants).

⁹⁹ *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 844-45, 864-65 (1984).

¹⁰⁰ Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67, 81 (2011) (stating that “[u]nder the first step, a court should determine ‘whether Congress ha[d] directly spoken to the precise question at issue’”) (alteration in original).

¹⁰¹ *Id.* (stating that “[w]hen 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’”).

interpretation of the statute, even if the court believes a different policy choice would be preferable.¹⁰² However, if the statute is ambiguous, and the agency interpretation is unreasonable, then the Court is free to substitute its own interpretation, according no deference to the agency's interpretation.¹⁰³

In *Chevron*, the Court stated that there were multiple reasons to grant strong deference to agency interpretations, provided the agency adhered to its congressional mandate to enforce the statute at issue.¹⁰⁴ Most importantly, agencies deserve deference because agencies are experts in their fields and are thus in the best position to interpret and enact complex and technical regulatory schemes.¹⁰⁵ Agency officials, moreover, as part of the executive branch, are more directly accountable to their constituency than are judges and the judiciary.¹⁰⁶ Hence, if the populace disapproves of the agency's actions, their constituency is free to voice their displeasure at the voting box.¹⁰⁷ *Chevron* deference, therefore, stands for the principle that agencies, not courts, should interpret their own policies.

C. *Skidmore* Deference: Agency Expertise

When Congress delegates lawmaking authority to an agency, *Chevron* applies;¹⁰⁸ if Congress does not delegate lawmaking authority to the agency, *Skidmore* deference applies.¹⁰⁹ Under *Skidmore*, the amount of deference accorded to agencies is determined based on a balancing test: agencies receive deference in proportion to the particular agency's interpretations "power to persuade"; the interpretation's "thoroughness, logic, and expertness"; how well the interpretation "fits with prior interpretations"; and "any other sources of weight" the court decides to evaluate.¹¹⁰ *Skidmore* deference is understood to be a lower level of deference than *Seminole* and *Chevron*, in accordance with the fact that Congress has not implicitly delegated the agency authority for this decision.¹¹¹ Thus, in situations in which *Skidmore* deference is warranted, courts have a heightened ability to assess the disputed interpretation.¹¹²

Cumulatively, the agency deference jurisprudence reflects many of the reasons courts defer to agencies. In short, the judiciary defers to agencies because any given agency best understands its own mission, budget, and staff—in general, its capabilities. In addition, an agency's collective expertise demands that it is in the best position to make decisions about the statutes, regulations, and policy choices under which it operates. Thus, the logic of deference holds that unless agency choices are wildly unreasonable or contradictory to congressional intent, courts should respect their choices.

¹⁰² *Chevron*, 467 U.S. at 843.

¹⁰³ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2083-84 (1990).

¹⁰⁴ *Id.* at 2084.

¹⁰⁵ *Chevron*, 467 U.S. at 844-45, 864-65.

¹⁰⁶ *Id.* at 865-66.

¹⁰⁷ *Id.*

¹⁰⁸ See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 143-57 (2011), for an explanation of the delegation of lawmaking authority.

¹⁰⁹ Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1116-31 (2001) (discussing *Skidmore* deference as applied to expert agency judgments).

¹¹⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), followed and quoted in *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

¹¹¹ *Skidmore*, 323 U.S. at 140.

¹¹² Eskridge & Baer, *supra* note 87, at 1109-10 (explaining that this form of deference grants more discretion to the judges).

III. GARDNER'S PRESUMPTION IN THE 1990S AND EARLY 2000S

The conflict between *Gardner's* Presumption and agency deference went unrecognized in the CAVC and the Federal Circuit until 2002 and 2000, respectively.¹¹³ Since that time, the lower courts have dealt with *Gardner's* Presumption in three different ways. First, in some cases, courts have relied on *Gardner's* Presumption as the primary support for its holdings, even in instances in which the court did not find the applicable statute or regulation to be ambiguous.¹¹⁴ Second, courts have used *Gardner's* Presumption as general support for holdings in Veterans' favor.¹¹⁵ Third, in cases in which the courts found in favor of VA, they have frequently made no mention of *Gardner's* Presumption at all.¹¹⁶ It is fair to say that the courts have used *Gardner's* Presumption rather inconsistently.

By the early 2000s both the CAVC and Federal Circuit had acknowledged and discussed the conflict between, specifically, *Chevron* deference and *Gardner's* Presumption, in *Jordan v. Principi*¹¹⁷ and *Boyer v. West*.¹¹⁸ First, in *Jordan*, the CAVC ignored *Gardner's* Presumption because it found the Veteran's interpretation "absurd."¹¹⁹ But then the CAVC changed its mind: in *Debeaord v. Principi*,¹²⁰ the court seemed to state, in dicta, that because *Brown v. Gardner* and *King v. St. Vincent's Hospital* were issued after *Chevron*, *Gardner's* Presumption always trumped *Chevron* deference.¹²¹ Following that holding, in another turnabout, the CAVC decided in *Haas v. Nicholson* that *Gardner's* Presumption did not apply when *Chevron* did.¹²²

The Federal Circuit, on the other hand, concluded early in 2003 that *Gardner's* Presumption did not always trump VA's reasonable interpretation of an ambiguous statute.¹²³ In *Terry v. Principi*,¹²⁴ the Federal Circuit clarified that *Gardner's* Presumption does not apply when *Chevron* does.¹²⁵ The Federal Circuit eventually, without offering a detailed—or any—rationale, concluded that *Chevron* deference trumps *Gardner's* Presumption.¹²⁶ Even after making that announcement, however, both courts continued to intermittently use *Gardner's* Presumption to rule for veterans in cases in which VA should have won because of agency deference.¹²⁷

¹¹³ See *Jordan v. Principi*, 16 Vet. App. 335 (2002), *opinion withdrawn* No. 00-206, 2002 WL 31445159 (Vet. App. Nov. 1, 2002); *Boyer v. West*, 210 F.3d 1351 (Fed. Cir. 2000).

¹¹⁴ See, e.g., *Otero-Castro v. Principi*, 16 Vet. App. 375, 382 (2002) (holding that the regulation was ambiguous and *Gardner's* Presumption should apply to interpretations of ambiguous regulations); *Cottle v. Principi*, 14 Vet. App. 329, 338 (2001) (holding that *Gardner's* Presumption applies to precedent opinions issued by VA's General Counsel); *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (holding that an attorney could not recover contingency fees and Equal Access to Justice Fees for one case, without ruling on whether or not the regulation was ambiguous).

¹¹⁵ See, e.g., *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (holding that the court need not give deference to the agency when interpreting the statute); *Davenport v. Brown*, 7 Vet. App. 476, 484 (1995) (holding that the agency's interpretation was antithetical to the plain meaning of the statute).

¹¹⁶ See, e.g., *Morton v. West*, 12 Vet. App. 477, 485 (1999) (holding that the statute was clear and in favor of the VA); *Wright v. Gober*, 10 Vet. App. 343, 346-47 (1997) (holding that the language was clear and in support of the VA).

¹¹⁷ 16 Vet. App. 335.

¹¹⁸ 210 F.3d 1351.

¹¹⁹ *Jordan*, 16 Vet. App. at 347-48.

¹²⁰ 18 Vet. App. 357, 368 (2004).

¹²¹ *Id.*

¹²² 20 Vet. App. 257 (2006), *rev'd sub nom.* *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

¹²³ *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003).

¹²⁴ 340 F.3d 1378 (Fed. Cir. 2003).

¹²⁵ *Id.*

¹²⁶ *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010).

¹²⁷ See *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (noting that when faced with ambiguous statutes, courts should hold for the

Yet by the mid-2000s, the Federal Circuit had somewhat ceased using *Gardner's* Presumption.¹²⁸ In *Nielson*, the court held that *Gardner's* Presumption should only be applied after all other canons of statutory construction had been exhausted: statutory ambiguity “does not compel us to resort to [*Gardner's* Presumption].”¹²⁹ Because of that directive, in the Federal Circuit, “*Gardner's* Presumption has morphed from a veteran’s ace in the hole, to a canon of last resort, to a doctrine effectively ignored.”¹³⁰ If *Gardner's* Presumption is used only after all other principles of statutory construction are used, it will never be used.

Alternatively, the CAVC continued to hold for veterans because of *Gardner's* Presumption, despite its earlier exhortation that *Chevron* deference trumped *Gardner's* Presumption. In both *Chandler v. Shinseki*¹³¹ and *Taylor v. Shinseki*,¹³² for example, the CAVC found for the Veteran because of *Gardner's* Presumption.¹³³ For whatever reason, the CAVC failed to follow the Federal Circuit’s lead in using *Gardner's* Presumption only *after* applying agency deference principles.

This was the confusing and conflicting state of the case law that led Professor Jellum and numerous academics and judges to conclude that there a problem within veterans law of which principle of deference reigned supreme.¹³⁴ And it was Judge O’Malley’s similar understanding of the case law, along with a citation to Professor Jellum’s article, that caused her to cry out to the Supreme Court for help in resolving this problem.

IV. JUDICIAL APPLICATION OF *GARDNER'S* PRESUMPTION IN THE LAST FIVE YEARS

Despite the gnashing of teeth regarding the conflict between *Gardner's* Presumption and agency deference, in recent years the conflict has become less and less relevant. During the last five years, in cases in which a VA interpretation has been in dispute, it has become exceedingly rare for the CAVC or the Federal Circuit to find for a veteran because of *Gardner's* Presumption—or to find that *Gardner's* Presumption overrides traditional modes of agency deference.¹³⁵ Because the most common

Veteran because of *Gardner's* Presumption); *McGee v. Peake*, 511 F.3d 1352, 1357-58 (Fed. Cir. 2008) (mentioning *Gardner's* Presumption and holding for the Veteran); *Chandler v. Shinseki*, 24 Vet. App. 23, 30-31 (2010) (finding for the Veteran due to *Gardner's* Presumption and the Secretary’s “absurd” interpretation of the statute); *Sharp v. Shinseki*, 23 Vet. App. 267, 275 (2009) (finding for the Veteran under *Gardner's* Presumption as the regulation was ambiguous and the Secretary’s interpretation unpersuasive); *Osman v. Peake*, 22 Vet. App. 252, 259 (2008) (stating that in a close call, the court would find for the Veteran because of *Gardner's* Presumption); *Hartness v. Nicholson*, 20 Vet. App. 216, 221-22 (2006) (holding for the Veteran because of *Gardner's* Presumption when faced with an ambiguous regulation).

¹²⁸ See, e.g., *Nielson*, 607 F.3d 802.

¹²⁹ *Id.* at 808.

¹³⁰ Jellum, *supra* note 14, at 102.

¹³¹ 24 Vet. App. 23 (2010).

¹³² No. 10-2588, 2012 WL 2218714 (June 18, 2012).

¹³³ *Id.* at *4 (finding for the Veteran because of *Gardner's* Presumption when faced with an ambiguous regulation); *Chandler*, 24 Vet. App. at 30-31 (finding for the Veteran due to *Gardner's* Presumption and the Secretary’s “absurd” interpretation of the statute).

¹³⁴ See, e.g., Jellum, *supra* note 14, at 61-62.

¹³⁵ To make this observation, I shepardized *Brown v. Gardner*, and analyzed every case in which the Federal Circuit or the CAVC cited to *Brown v. Gardner*. In many of those cases, the courts cited to *Gardner* not for *Gardner's* Presumption but for the substantive holding in that case regarding 38 U.S.C. § 1151. Of the 98 cases I read from the past five years in which *Brown v. Gardner* was cited, veterans prevailed because of *Gardner's* Presumption in only two cases. Of the 98 cases I read from the past 10 years in which the Federal Circuit cited to *Brown v. Gardner*, veterans prevailed because of *Gardner's* Presumption in only two instances. Although these numbers seem to make a strong case that *Gardner's* Presumption has declined in relevance, I believe the actual numbers in favor of its demise might be even more dramatic. Because I only shepardized cases in which *Brown v. Gardner* was cited, I missed many cases in which the CAVC or the Federal Circuit ruled in favor of VA due to agency deference and failed to either mention *Gardner's* Presumption or cite to *Brown v. Gardner*. As such, there are presumably a large number of cases that are relevant to this discussion but that cannot be systematically organized in this Article.

understanding of *Gardner*'s Presumption boils down to the statement in *Gardner* that “interpretive *doubt* is to be resolved in favor of the veteran,” cases in which courts find the interpretation of the statute or regulation in dispute are the most instructive. Yet when faced with ambiguous statutes or regulations, courts have frequently chosen not to mention *Gardner*'s Presumption.¹³⁶

In the last five years, the Federal Circuit has not used *Gardner*'s Presumption to rule in favor of a veteran, even in situations in which the statute or regulation that was the subject of the challenged interpretation was found to be ambiguous, and the CAVC has only done so twice.¹³⁷ Looking a little further back, in the last ten years, the Federal Circuit has only used *Gardner*'s Presumption to uphold a veteran's interpretation of a challenged statute or regulation twice.¹³⁸ Instead, in almost all cases, the CAVC and the Federal Circuit applied the usual principles of agency deference to uphold VA interpretations, and in most of these cases, the court failed to mention *Gardner*'s Presumption.

When *Gardner* is cited nowadays, it is generally not cited to override a VA interpretation of an ambiguous statute or regulation. This Section discusses the three most common ways courts cite to *Gardner*. First, CAVC Chief Judge Kasold uses *Gardner*'s Presumption in dissent, chastising his colleagues for holding for VA under agency deference instead of ruling for the Veteran under *Gardner*'s Presumption. Chief Judge Kasold's use of *Gardner*'s Presumption adheres to the literal language of *Gardner*, and it is the most problematic usage of *Gardner* because, as previously discussed, it conflicts with agency deference principles. Second, there are numerous cases in which the courts evaluate regulations and interpretations as either clear or ambiguous without any mention of *Gardner*'s Presumption. Third, the courts sometimes refer to *Gardner*'s Presumption in passing, without relying on it for its ruling.

A. *Gardner*'s Presumption Used Only in Dissent

In the two cases discussed in this subsection, the CAVC ruled for VA in deference to the agency's reasonable interpretation, notwithstanding the Veteran-litigants' proffered interpretation. However, in both cases, Chief Judge Kasold issued a dissent arguing for the super-strong application¹³⁹ of *Gardner*'s Presumption. These cases illustrate both the diminishing practical effects of *Gardner*'s Presumption (since Chief Judge Kasold's view did not persuade a majority), as well as the continuing jurisprudential tension between agency deference and *Gardner*, which is apparent in Chief Judge Kasold's dissents.

In the 2014 case of *Hudgens v. Gibson*,¹⁴⁰ Mr. Hudgens, a Veteran, argued that the plain language of 38 C.F.R. § 4.71a, Diagnostic Code 5055, governing disability ratings for total knee replacements applied to even partial knee replacements.¹⁴¹ Mr. Hudgens further argued that if the court were to find the regulation ambiguous, it should find in favor of him due to *Gardner*'s

¹³⁶ See *supra* Section III.

¹³⁷ *Taylor*, 2012 WL 2218714, at *4 (holding that “[t]o the extent that the scope of this Diagnostic Code is ambiguous, that ambiguity must be resolved in the veteran's favor); *Chandler*, 24 Vet. App. at 27 (holding that as the Secretary's interpretation would lead to absurd results under the law and the regulation was ambiguous, *Gardner*'s Presumption directed the court to rule in favor of the veteran).

¹³⁸ *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (finding that when faced with ambiguous statutes, courts should hold for the veteran because of *Gardner*'s Presumption); *McGee v. Peake*, 511 F.3d 1352, 1356-58 (Fed. Cir. 2008) (mentioning *Gardner*'s Presumption and holding for the Veteran).

¹³⁹ Jellum, *supra* note 14, at 69 (explaining *King*'s super-strong formulation of *Gardner*'s Presumption).

¹⁴⁰ 26 Vet. App. 558 (2014), *rev'd sub nom.* *Hudgens v. McDonald*, No. 2015-7030, 2016 WL 2893254 (Fed. Cir. May 18, 2016).

¹⁴¹ *Id.* at 559-60.

Presumption.¹⁴² VA, in turn, alleged that the plain language of the regulation applied only to total, compound knee joint replacements and not to partial knee replacements.¹⁴³ Furthermore, VA argued, were the court to find the language ambiguous, it should defer to VA's interpretation of its regulation.¹⁴⁴

The CAVC majority found that the regulation clearly applied only to total, compound knee replacements and not partial knee replacements.¹⁴⁵ Because the majority found the meaning of the statute unambiguous, it concluded that it was unnecessary to discuss the parties' arguments concerning *Gardner* and agency deference.¹⁴⁶

In dissent, Chief Judge Kasold found that the regulation was ambiguous, due to the fact that VA had, in the past, promulgated inconsistent interpretations of that regulation.¹⁴⁷ He believed the inconsistent interpretations reflected regulatory ambiguity.¹⁴⁸ The Chief Judge further reasoned, however, that in this case VA's interpretation of the regulation at issue was not entitled to any deference, for *Gardner* trumped *Chevron*.¹⁴⁹ Without further explaining whether the *Gardner* "trump" should apply only in situations in which VA has issued conflicting interpretations, or more broadly in conflict with *Chevron* and other canons of agency deference, Chief Judge Kasold cited to *Brown v. Gardner*.¹⁵⁰ Interestingly, Chief Judge Kasold also failed to note that when an interpretation of a regulation is in issue, *Seminole Rock* deference should apply and not *Chevron*.¹⁵¹

In *Pacheco v. Gibson*,¹⁵² a Veteran appealed the effective date for an award of service connection, arguing that VA misinterpreted 38 C.F.R. § 3.157(b) by failing to grant him an effective date based on the date he had submitted an earlier claim that was previously denied.¹⁵³ After discussing the regulation and the varying ways in which it might be interpreted, the CAVC majority noted that it was ambiguous and concluded that, "[g]iven the ambiguity in the regulation, the Secretary's interpretation will be afforded deference so long as it is not plainly erroneous or inconsistent with the regulation, and there is no reason to suspect that it does not reflect his fair and considered judgment on the matter in

¹⁴² *Id.* at 559.

¹⁴³ *Id.*

¹⁴⁴ *Id.* Courts, litigants, and VA frequently fail to specify which canon of agency deference applies. In this situation, because a regulation was in issue, *Seminole Rock*, and not *Chevron*, deference applied. Because agencies receive less deference under *Seminole* than they do under *Chevron*, if *Gardner* were still in favor with the judiciary, I would expect courts to use it in such situations. When arguing for deference, the Secretary argued that "the Court must defer to [the Secretary's] regulatory interpretation as expressed on appeal and in a 2009 VA *Compensation and Pension Service Bulletin*." *Id.* Nowhere did the Secretary specify which form of deference VA deserved.

¹⁴⁵ *Id.* at 560.

¹⁴⁶ *Id.* at 562. It is now very rare for courts to use *Gardner's* Presumption when the regulation is unambiguous, in contrast to several years ago when it made less difference whether or not the court considered the regulation to be ambiguous. Jellum, *supra* note 14, at 75-81 (discussing the many instances in which courts used *Gardner's* Presumption without concluding whether or not the regulation was ambiguous).

¹⁴⁷ *Id.* at 565 (Kasold, C.J., concurring in part and dissenting in part).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 567 ("[I]n my opinion, this is when *Gardner* trumps *Chevron* with regard to regulatory interpretation."). Chief Judge Kasold failed to note *Chevron* deference was not at issue, as *Seminole* deference was appropriate.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² 27 Vet. App. 21 (2014).

¹⁵³ *Id.* at 22. The Veteran had previously been denied disability compensation in a July 1974 rating decision, which he did not appeal. After several unsuccessful attempts to reopen the disability claim in the 1980s and 1990s, the Veteran submitted another application to reopen in January 2002, and was subsequently awarded service connection. The issue on appeal was the effective date of the award—specifically, the question was whether 38 C.F.R. § 3.157(b) permitted an effective date beginning on the date of receipt of the most recent application to reopen (January 2002), or on the date the original claim was submitted (1974). VA had interpreted the regulation to mean that the earliest effective date the Veteran could receive was the date he submitted his most recent application to reopen. The Veteran argued that he was entitled to the 1974 effective date.

question.”¹⁵⁴ Notably, the majority made no mention of either *Gardner*’s Presumption or *Seminole* in concluding VA’s interpretation was reasonable.

In a separate opinion, concurring in part yet dissenting in regard to the issue of agency deference, the minority turned to *Gardner*’s Presumption.¹⁵⁵ The judges found that VA’s interpretation was unreasonable because it was not consistent with the regulation and did not reflect the Secretary’s considered opinion.¹⁵⁶ In support of this, the dissenters then cited to *Gardner* for the general proposition that “interpretive doubt is to be resolved in the veteran’s favor.”¹⁵⁷ The dissent continued by arguing that VA should not be permitted to receive deference for a never-before-published interpretation, using *Gardner* as support for the proposition that such an interpretation should not be employed “to resolve ambiguity in a regulation in a manner unfavorable to the veteran.”¹⁵⁸

In *Hudgens* and *Pacheco*, the majority failed to mention *Gardner*’s Presumption, instead deferring to VA’s interpretations of regulations. *Gardner* came up in the dissents, where Chief Judge Kasold and others reiterated that when ambiguity is found in the statute or regulation, *Gardner*’s Presumption has a part to play in nudging courts to rule in favor of the veteran-litigant. Although the “interpretive doubt” language of *Gardner* literally suggests that the dissents in these cases are correct, the fact that the majority in *Pacheco* chose to ignore *Gardner*’s Presumption indicates that it is losing its power as a doctrine of interpretation.

B. Agency Deference Without Any Mention of *Gardner*’s Presumption

In the three cases discussed below, a veteran-litigant challenged VA’s interpretation of a statute or regulation which the CAVC found to be ambiguous. Thus, under the literal meaning of *Gardner*’s Presumption, these would be the prototypical situations in which a court would apply the presumption in favor of the litigant. Yet the court did not mention *Gardner*’s Presumption in any of the three. Instead, the court applied principles of agency deference and upheld VA’s interpretation.

In *Cacciola v. Gibson*,¹⁵⁹ the central question on appeal involved VA’s interpretation of 38 C.F.R. § 20.1400(b), which governed the situations in which BVA decisions were reviewable after they were appealed to the CAVC.¹⁶⁰ VA had interpreted 38 C.F.R. § 20.1400(b) to find that an appeal which had been abandoned by the appellant had been “appealed” under the meaning of the regulation.¹⁶¹ The CAVC set out to determine whether VA’s understanding of 38 C.F.R. § 20.1400(b) was entitled to deference.¹⁶²

¹⁵⁴ *Id.* at 26. Again, no mention was made of which form of deference the Secretary received.

¹⁵⁵ *Id.* at 36.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 42 (Davis, J., concurring in part and dissenting in part). The dissent concluded by citing *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000), for the proposition that “traditional *Chevron* analysis is modified by the doctrine that interpretive doubt is to be resolved in the veteran’s favor.” *Id.* However, as *Pacheco* was a case of regulatory interpretation, *Chevron* would not have applied. Furthermore, the dissent noted that “veterans ‘cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.’” *Id.* (quoting *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000)). But as the regulation in this instance was found to be ambiguous and not clear, it is unclear what good *Boyer* actually does in this context.

¹⁵⁹ 27 Vet. App. 45 (2014).

¹⁶⁰ *Id.* at 50.

¹⁶¹ *Id.* at 51.

¹⁶² *Id.* Both parties agreed that VA’s interpretation of 38 U.S.C. § 7111 (2012) did not preclude a claimant from seeking review of a BVA decision on the basis of clear and unmistakable error; rather, the question was whether a party’s abandonment of an appeal constituted a final “decision” by the court so as to preclude BVA review. *Id.*

As an initial matter, the CAVC found the governing statute, 38 U.S.C.A. § 7111, to be ambiguous, as it did not speak to the precise issue of whether an abandoned appeal to the court was a “decision.”¹⁶³ The CAVC further found that 38 C.F.R. § 20.1400(b) was also ambiguous as to the specific issue on appeal.¹⁶⁴ Without mentioning *Gardner*, the CAVC found that VA’s interpretation of its regulation was consistent with the applicable law, and agency deference was therefore appropriate.¹⁶⁵ Thus, in this case, the CAVC found the statutes and regulations ambiguous, yet still found for VA without any mention of *Gardner's* Presumption.

Mulder v. Gibson represents a group of cases in which the CAVC found a disputed statute or regulation to be clear and consistent with the Secretary’s interpretation (subsequently challenged by a Veteran-litigant) without mentioning *Gardner's* Presumption, even when agency deference was relevant or discussed.¹⁶⁶ In *Mulder*, a Veteran appealed an adverse BVA decision, alleging that he deserved a higher disability compensation payment.¹⁶⁷ Mr. Mulder, who had been incarcerated and had been receiving disability benefits prior to his conviction, claimed the BVA erred in determining the proper effective date for the reduction of his benefits.¹⁶⁸ Specifically, Mr. Mulder argued that reductions in benefits due to incarceration should begin at the date of sentencing, rather than the date of conviction.¹⁶⁹

Interpreting 38 U.S.C. § 5313(a)(1), VA’s General Counsel released a decision stating that the reduction of benefits did not begin until after “the pronouncement of guilty for [the] requisite crime” and that the “period of incarceration” for purposes of section 5313 includes “any period of incarceration between the *date of conviction and the date of sentencing*.”¹⁷⁰ Mr. Mulder argued that until his sentencing, he was incarcerated pursuant to the Wisconsin bail statute, not for a felony.¹⁷¹ Because he was not incarcerated for a felony until his sentencing, he claimed, he should have continued to receive his disability benefits until that date.¹⁷² The Secretary argued that the meaning of the statute was clear and in VA’s favor.¹⁷³

The phrase at issue was “incarcerated . . . for conviction of a felony.”¹⁷⁴ In its reading of the statute as a whole, the court determined the language was generally clear and accorded with VA’s interpretation.¹⁷⁵ Furthermore, to the extent the phrase was ambiguous, the court determined that *Skidmore* deference compelled it to find in favor of VA.¹⁷⁶ Throughout the opinion, the court made no mention of *Gardner's* Presumption.

¹⁶³ *Id.* Specifically, 38 U.S.C. § 7111 was silent as to which BVA decisions are reviewable for clear and unmistakable error, whereas 38 C.F.R. § 20.1400(b) provides that all BVA decisions are reviewable, with two exceptions: (1) decisions on issues which have been appealed to and decided by a court of competent jurisdiction and (2) decisions on issues which have subsequently been decided by a court of competent jurisdiction.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 27 Vet. App. 10 (2014).

¹⁶⁷ *Id.* at 12.

¹⁶⁸ *Id.* at 13-14.

¹⁶⁹ *Id.* 38 U.S.C. § 5313(a)(1) states that “any person who is entitled to compensation . . . and who is incarcerated in a Federal, State, local, or other penal institution or correctional facility for a period in excess of [60] days for conviction of a felony shall not be paid such compensation . . . for the period beginning on the [61st] day of such incarceration and ending on the day such incarceration ends.” 38 U.S.C. § 5313(a)(1) (2012).

¹⁷⁰ *Mulder*, 27 Vet. App. at 12 (quoting VA Gen. Coun. Prec. 3-2005 (Feb. 23, 2005)).

¹⁷¹ *Id.* at 14-15.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 18 (alteration in original).

¹⁷⁵ *Id.* at 15.

¹⁷⁶ *Id.* at 18. *Skidmore* deference would have been appropriate in this situation if the court had been applying it to the General Counsel’s decision.

*Gill v. Shinseki*¹⁷⁷ is one of a number of cases in which the CAVC found a disputed regulation or statute to be ambiguous—the situation in which a court would seemingly be most likely to apply *Gardner*'s Presumption—only to apply canons of agency deference without mentioning *Gardner*'s Presumption at all. In *Gill v. Shinseki*, the Veteran appealed a 10% disability rating for high blood pressure, arguing that his rating examination did not include blood pressure ratings from three different days, as required by 38 C.F.R. § 4.104, Diagnostic Code 7101, Note 1.¹⁷⁸ VA argued that Note 1 of Diagnostic Code 7101 only required multiple blood pressure readings for an initial confirmation of high blood pressure, and not for an assignment of a disability rating.¹⁷⁹ Thus, VA argued that the regulation was unambiguous.¹⁸⁰ In the alternative, VA argued, if Note 1 was deemed ambiguous, the Secretary's comments in a VA final rule from December 1997 reflected the interpretation that Note 1 applied only to confirmation of a diagnosis, and not to rating determinations.¹⁸¹ Given these comments, VA argued that its interpretation was entitled to deference.¹⁸²

The court discussed the canons of agency deference in regulatory interpretation, finding that if the meaning of a regulation is unclear from its language, courts defer to the Secretary's interpretation if it is consistent with the language and not erroneous.¹⁸³ Without addressing *Gardner*'s Presumption, the court then noted that “the Secretary's interpretation of his own regulations is entitled to substantial deference.”¹⁸⁴ Applying these principles to the matter at hand, the court found Note (1) of Diagnostic Code 7101 to be ambiguous.¹⁸⁵ Turning to the Secretary's explanatory comments regarding Note (1), the court found them consistent and reflective of considered judgment, and thus entitled to deference.¹⁸⁶ In applying *Skidmore* deference, *Gardner*'s Presumption was not mentioned.¹⁸⁷

Mulder and *Gill* are examples of several cases that dealt with agency deference in contexts in which *Gardner* could conceivably apply. However, in these examples, the CAVC simply used traditional canons of agency deference. *Gardner*'s Presumption played no part in the analysis.

C. Cases in Which *Gardner*'s Presumption Is Cited, Yet Is Irrelevant to the Decision

Courts will occasionally invoke the language of *Gardner*'s Presumption in passing as general support for its holding. In some instances—especially in older cases—the actual language of *Gardner*'s Presumption has no bearing on the final decision.¹⁸⁸ In *Nielson v. Shinseki*,¹⁸⁹ a Veteran had all his teeth removed while in service due to a periodontal infection.¹⁹⁰ After his separation from service, he argued that he was entitled to disability benefits under the “service trauma” statute, which provided that veterans

¹⁷⁷ 26 Vet. App. 386 (2013).

¹⁷⁸ *Id.* at 387-88.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 388.

¹⁸³ *Id.* at 389.

¹⁸⁴ *Id.* at 390.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 391.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Mason v. Shinseki*, 743 F.3d 1370 (Fed. Cir. 2014) (finding that a statute plainly supports VA's interpretation, and mentioning that this conclusion does not contradict *Gardner*'s Presumption); *Spicer v. Shinseki*, 752 F.3d 1367 (Fed. Cir. 2014).

¹⁸⁹ 607 F.3d 802 (Fed. Cir. 2010).

¹⁹⁰ *Id.* at 803.

receive benefits for “service-connected dental conditions or disabilities due to combat wounds or other service trauma.”¹⁹¹ In short, Mr. Nielson claimed that the removal of his teeth during service qualified as a “service trauma” under the statute, explicitly arguing that, in the event of ambiguity, *Gardner's* Presumption should compel the court to find in his favor.¹⁹² Conversely, VA argued that the Veteran’s teeth removal did not constitute “service trauma,” and the Veteran was therefore not entitled to benefits.¹⁹³

On appeal, the Federal Circuit decided that the statute was unambiguous and plainly supported VA’s interpretation.¹⁹⁴ However, since Mr. Nielson urged the court to find in favor of his interpretation, in light of *Gardner's* directive that interpretive doubt is to be resolved in the Veteran’s favor, the court concluded: “[t]he 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[;] [r]ather, that canon is only applicable after other interpretive guidelines have been exhausted, including *Chevron*.”¹⁹⁵ In other words, only if no other interpretive canons—including those of agency deference—applied would *Gardner's* Presumption be the appropriate basis for holding in a veteran-litigant’s favor.¹⁹⁶ Thus, in 2010, the Federal Circuit conclusively stated that *Gardner's* Presumption could only be used as a last resort, not as an interpretative “trump card.”¹⁹⁷ Since *Nielson*, the Federal Circuit has continued to employ this approach.

In *Mason v. Shinseki*,¹⁹⁸ a Veteran, who was represented by counsel, failed to timely file a notice of disagreement for a “denial of direct fees.”¹⁹⁹ After filing an administrative appeal, the BVA held that 38 U.S.C. § 7105A’s 60-day period for filing a notice of disagreement (when represented by an attorney) applied to the appellant’s “simultaneously contested claim” for attorney’s fees.²⁰⁰ The pertinent regulation, 38 C.F.R. § 20.3(p), stated that “denials of direct-fee requests should be treated as ‘simultaneously contested claims’ subject to a 60-day [notice of disagreement] period.”²⁰¹ As such, VA treated the claim as a simultaneously contested claim that fell under the provisions of 38 U.S.C. § 7105A.²⁰² On appeal, the Veteran argued that he should be given a one-year filing period (pursuant to the § 7105 provision governing general filings of notices of disagreement) instead of the 60-day filing period that specifically applied to litigants who were appealing simultaneously contested claims.²⁰³ In contrast, VA argued that 38 C.F.R. § 20.3(p) applied, and that, even in the event the regulation was ambiguous, VA’s interpretation of it was entitled to deference.²⁰⁴

¹⁹¹ 38 U.S.C. § 1712(a)(1)(C).

¹⁹² *Nielson*, 607 F.3d at 804.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 808.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* As Professor Jellum points out, this argument does not make sense. As formulated in *Nielson*, *Gardner's* Presumption would only be applied in cases in which the court found VA’s interpretation of an ambiguous regulation unreasonable. Given that those cases are few and far between, this formulation would render *Gardner's* Presumption almost powerless. Jellum, *supra* note 14, at 100-01.

¹⁹⁷ *Nielson*, 607 F.3d at 808.

¹⁹⁸ 743 F.3d 1370 (Fed. Cir. 2014).

¹⁹⁹ *Id.* at 1373.

²⁰⁰ A “simultaneously contested claim” is a claim where one claim is allowed and one is rejected. 38 U.S.C. § 7105A (2012). “Simultaneously contested claim” is further defined as the situation in which the allowance of one claim results in the disallowance of another claim involving the same benefit, or the allowance of one claim results in the payment of a lesser benefit to another claimant. 38 C.F.R. § 20.3(p) (2015); *see also Mason*, 743 F.3d at 1371.

²⁰¹ VA’s interpretation regarding this issue was also expressed in VA’s Claim Adjudication Manual. *Mason*, 743 F.3d at 1373.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 1374.

The court found that, for purposes of the specific direct-fee request issue, the regulation was ambiguous, and thus turned to VA's interpretation of its regulations.²⁰⁵ Citing principles of agency deference, the court then upheld VA's interpretation—despite the *Gardner* language—because the interpretation was based on a permissible construction of the regulation.²⁰⁶ In upholding VA's interpretation of its own regulation, the court noted that “[a]n agency’s interpretation of its own regulations is ‘controlling unless plainly erroneous or inconsistent with the regulations being interpreted.’”²⁰⁷ However, at the conclusion of the opinion, the court noted in a footnote that:

[T]he VA’s position abides by the general principle that ‘interpretive doubt is to be resolved in the veteran’s favor.’ After rejecting an attorney’s direct-fee request, the VA withholds the contested funds until the conclusion of the attorney’s appeal or, if no appeal is filed, the period for filing an NOD. As the Veterans Court aptly reasoned, applying a sixty-day NOD period to the denial of direct-fee requests favors veterans because full payment to a veteran will not be withheld ‘for an entire year merely to allow an attorney—supposedly well-versed in veterans law—an additional 305 days to file an NOD.’²⁰⁸

Thus, the Federal Circuit appeared to have determined that its method of analysis was consistent with *Gardner* simply because the resolution in the case was favorable to veteran-litigants.

In *Spicer v. Shinseki*,²⁰⁹ a Federal Circuit case, the Veteran-litigant claimed the BVA and CAVC erred by not considering Diagnostic Code 5003 in the assignment of a 10% disability rating for his finger injury.²¹⁰ The court reviewed the relevant statute and Diagnostic Code 5003, and determined that the plain language supported VA.²¹¹ The court stated that its finding was “not contrary to the Supreme Court’s mandate that ‘interpretive doubt is to be resolved in the veteran’s favor.’ There is no ambiguity in [Diagnostic Code] 5003, and referencing Section 4.45(f) to interpret [Diagnostic Code] 5003 does not create interpretive doubt.”²¹² Thus, as in *Mason*, the court paid homage to *Gardner*’s Presumption.²¹³ In *Spicer*, however, the result was not favorable to the Veteran, but as the situation warranted no deference to VA, *Gardner*’s Presumption would not have functioned as an interpretative “trump card” in any event. These cases demonstrate the current powerlessness of *Gardner*’s Presumption.

V. THE PROBLEM WITH *GARDNER*’S PRESUMPTION: IT HURTS VETERANS

Gardner’s Presumption threatens an already-fraught adjudicative process by introducing more uncertainty and complexity into VA’s decision-making process. Responding to the substantial volume of VA disability benefits claims is an immense undertaking. At any given moment, there are thousands of cases floating through the VA appeal system and the Federal Circuit. Given these large numbers, it is understandable that VA seeks bright-line rules in its benefits distribution—rules that are

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1374.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1367 n.5 (citations omitted).

²⁰⁹ 752 F.3d 1367 (Fed. Cir. 2014).

²¹⁰ *Id.* at 1369.

²¹¹ *Id.* at 1369-71.

²¹² *Id.* at 1371 (citation omitted).

²¹³ *Id.* at 1371 (citing the language from *Gardner* yet not addressing it); *Mason*, 743 F.3d at 1367 n.5 (stating that the outcome supports *Gardner*’s Presumption without elaborating on the reasoning).

easy to apply and thus facilitate efficient decision making. *Gardner's* Presumption makes it harder for courts to fulfill that task.

Yet despite its seemingly clear directive, *Gardner's* Presumption is not often employed to override agency interpretations today, and as a result, causes few practical problems. But the conflict between the presumption and principles of agency deference endures as a conceptual and jurisprudential flaw in veterans law. If, for example, Chief Judge Kasold's view of *Gardner's* Presumption were to gain credence among a CAVC majority, it could completely alter the way VA interpretations are handled in the courts, and threaten the countless VA interpretations of statutes, regulations, and other guiding documents. Paradoxically (given that *Gardner's* Presumption is a supposedly "veteran-friendly" canon of interpretation), such a scenario would create disruptions in veterans law, and thereby harm veterans, in two important ways.

This section discusses the primary way the courts' use of *Gardner's* Presumption harms veterans: allowing *Gardner's* Presumption to trump otherwise legitimate VA interpretations risks creating more procedurally complex common law, thereby inhibiting the efficiency of the decision-making process and threatening the "easy, no attorney needed" veterans law model.

When courts override a VA interpretation and rule for a particular veteran-litigant on the basis of *Gardner's* Presumption, that veteran reaps benefits that may hamper the efficiency of the system as a whole; the benefits of the court's "veteran-friendly decision" are isolated to that litigating veteran.²¹⁴ By rejecting the philosophical underpinnings of traditional agency deference, the court, in an attempt to be veteran-friendly, rules against the agency whose mission it is to perpetuate policies that are most beneficial and friendly to all veterans.²¹⁵ However, when courts substitute their own judgment in place of VA's in the case of individual veterans, VA's ability to make decisions for the benefit of all veterans is undercut.²¹⁶

Because of VA's commitment to serving veterans and ensuring the user-friendly design of the veterans' benefits system, VA and its Secretary interpret veterans' benefits statutes and regulations in the manner they believe best fulfills the VA mission as efficiently and effectively as possible, while taking into account budgetary concerns, staffing situations, departmental priorities, and the sheer number of disability benefits claims.²¹⁷ As the agency charged with fulfilling Abraham Lincoln's charge to "care for

²¹⁴ See Ridgway, *Changing Voices*, *supra* note 14, at 1187-90 (discussing how a veteran-litigant's win because of *Gardner's* Presumption might not be beneficial for veterans as a class).

²¹⁵ *Mission, Vision, Core Values & Goals*, *supra* note 23; *I CARE Core Values*, U.S. DEP'T OF VETERANS AFFAIRS, www.va.gov/icare (last visited Sept. 29, 2016) ("Our core values focus our minds on our mission of caring and thereby guide our actions toward service to others . . . I am convinced that it is critical that all of us at VA reaffirm our commitment to our mission and our values. Our commitment to serving veterans must be unquestioned. Veterans must know that we are 'all in' when it comes to accomplishing our mission and living by our values.").

²¹⁶ See *Cottle v. Principi*, 14 Vet. App. 329, 336-37 (2001) (holding that a Veteran injured while working for the Dallas transit system as part of his post-training employment was injured in the pursuit of a course of vocational rehabilitation and thus received disability compensation). In this case, VA argued the Veteran did not qualify for disability compensation benefits because a veteran engaged in post-training employment did not qualify within the meaning of the statute. By holding for the Veteran, the courts opened VA up to an entirely new area of benefits in which large amounts of compensation might be needed. Providing compensation for this Veteran and others like him may thus prevent VA from providing as many disability benefits and the highest medical care possible to veterans injured within the course of military service.

²¹⁷ See Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55, 68 (2010) (stating that "VA has a constant goal to have an efficient claims and adjudication process in which it does not compromise quality of decisions"); see also *White v. Matthews*, 559 F.2d 852, 858 (2d Cir. 1977) (stating that disability insurance programs must ameliorate hardships stemming from disabilities and should not tolerate delays in processing claims); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 289-95 (2010); Anthony W. Orlando, *Guess Who Tried to Prevent the VA Crisis*, HUFFINGTON POST, http://www.huffingtonpost.com/anthony-w-orlando/va-scandal-funding_b_5414685.html (last updated July 30,

those who have borne the battle,” VA has the subject-matter expertise and necessary experience to make such decisions.²¹⁸ Like all agencies, VA makes mistakes—sometimes significant ones.²¹⁹ But in the long run, VA is the entity in the best position to serve veterans as a whole.

In practice, veteran-litigants like flexible standards that allow for creative arguments and more leeway on appeal, but the VA likes bright-line rules. As Professor Ridgway explains:

Rules draw sharp lines, whereas standards allow for individualized judgments. Rules facilitate delegation within agencies by giving subordinates clear instructions, whereas standards increase the likelihood of erroneous and inconsistent decisions by front-line administrators. Rules cost more up-front to formulate and promulgate, whereas standards cost more to apply and enforce.²²⁰

When courts utilize *Gardner*'s Presumption to rule for a veteran arguing for a flexible standard instead of VA and its argument for a bright-line rule, it puts in place fuzzy boundaries that create delays and unnecessary complications for veterans law.²²¹

When courts utilize *Gardner*'s Presumption to rule in favor of flexible standards instead of the VA's bright-line rule, it has wide-ranging impacts, beginning with the effects of the adjudication of those newly enacted standards at the RO level.²²² As Professor Ridgway explains, “[b]right-line rules promote speedy and consistent decision making on the front lines,”²²³ but fuzzy standards do not. Front-line adjudicators, for example, who are not lawyers, may not be able to apply legally and procedurally complicated standards to the thousands of veterans' claims they process each year.²²⁴ Professor Ridgway noted that adjudicating a fuzzy standard instead of a bright-line rule can increase the amount of time RO adjudicators spend on a claim by five minutes; the extra five minutes would result in an additional 100,000 hours of employee resources in a system handling 1.2 million claims every year. This extra work would force VA to hire 50 additional full-time employees.²²⁵ Fuzzy standards delay veterans from receiving their benefits while creating more procedural opportunities for veterans to appeal by arguing the RO applied the standard incorrectly.

Fuzzy standards, moreover, involve VA in more litigation, for it is easier for litigants to successfully demonstrate that VA applied a fuzzy rule incorrectly than it is to argue that VA applied a simple, straightforward rule incorrectly.²²⁶ Under fuzzy standards, “the hundreds of thousands of disability benefits claims presented each year reveal an endless array of factual and procedural circumstances, and the flexibility embodied by standards will often allow for favorable outcomes in a wider spectrum of cases than could be achieved through a simple rule.”²²⁷ Each time a veteran succeeds with a fuzzy standard, that new fuzzy

2014) (discussing how VA's lack of money contributed to the recent scandals at the VA).

²¹⁸ *Mozur v. Turnage*, 729 F. Supp. 27, 30 (E.D. Pa. 1990) (holding that VA's subject-matter expertise made it the proper decision-maker, not the court).

²¹⁹ Katie Zezima, *Everything You Need to Know About the VA—and the Scandals Engulfing It*, WASH. POST, May 30, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/21/a-guide-to-the-va-and-the-scandals-engulfing-it> (discussing the VA hospitals which lied about the wait time for veterans to receive medical care); see generally Ridgway, *The Splendid Isolation Revisited*, *supra* note 22 (discussing the history of VA and the many scandals it has faced over its tenure).

²²⁰ Ridgway, *Changing Voices*, *supra* note 14, at 1184.

²²¹ *Id.* at 1183 (noting that the rulings of the Federal Circuit “reflect a preference for a flexible, standards-based approach to deciding veterans' claims” instead of categorical rules that enable VA to fairly and efficiently process claims).

²²² *Id.* at 1185.

²²³ *Id.* at 1185-86.

²²⁴ *Id.* at 1186.

²²⁵ *Id.* at 1188 n.89.

²²⁶ *Id.* at 1186.

²²⁷ *Id.*

standard is more difficult to interpret and apply, making it harder for veterans to navigate the benefits process without the assistance of a lawyer.²²⁸ When courts rule in favor of a veteran arguing for the application of a fuzzy standard, it creates harder-to-apply standards which frustrate veterans without lawyers.²²⁹

VI. SOLUTION: TAKE *GARDNER'S* PRESUMPTION OUT OF THE COURTS BECAUSE *GARDNER'S* PRESUMPTION IS INCOMPATIBLE WITH AGENCY DEFERENCE AND DETRACTS FROM VA'S MISSION

While the principle that interpretive doubt should be resolved in favor of veteran-litigants conflicts with the general principle of deferring to agency interpretations, the principle of liberally helping veterans aligns with VA's mission to serve veterans. *Gardner's* Presumption should cease operating as a judicial rule and instead be reimagined as an internal directive to VA in its decision making process.²³⁰ As Professor Jellum stated, we should “view the directive that interpretive doubt is to be resolved in the veteran's favor as a duty belonging to the VA and not as an interpretive tool belonging to the courts.”²³¹

Removing *Gardner's* Presumption from the courts seems radical, yet such a step is no less radical than the extreme evolution *Gardner's* Presumption has undergone in the past 20 years.²³² It would, in fact, be a fitting conclusion to its storied history, which featured an evolution from the declaration that veterans' benefits laws were remedial and thus should be construed liberally to a super-strong presumption that enabled litigants' interpretations to trump VA's interpretations despite principles of agency deference. In the past five years, *Gardner's* Presumption has generally faded from use, yet it still lurks in the background of many dissenting and concurring opinions and features prominently in the arguments of many veteran-appellants.²³³ To place the impetus of *Gardner* at the VA level would facilitate the broadest, most generous understanding of *Gardner's* Presumption by the agency most capable of making those judgments, without sacrificing efficiency and efficaciousness in serving veterans.

VA could utilize *Gardner's* Presumption in multiple ways. As suggested by Professor Jellum, VA could include a statement in all regulations, interpretations, and General Counsel precedent decisions it promulgates, indicating why VA's action resolved interpretive doubt in favor of veterans.²³⁴ ROs and the BVA can include short sections in their findings and opinions stating how they resolved any interpretive ambiguity in favor of veterans, especially in cases where they ruled against the veteran-appellant.²³⁵ This section discusses the six most beneficial developments that would occur were VA, and not the courts, to utilize *Gardner's* Presumption.

²²⁸ *Id.* at 1186-91.

²²⁹ *Id.*

²³⁰ Jellum, *supra* note 14, at 120-21.

²³¹ *Id.* at 120 (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

²³² Consider also the observation offered by Michael Allen that, at times, the courts are reticent to use *Gardner's* Presumption to its fullest extent and as it was intended to be used by the Supreme Court. As Professor Allen stated, “[w]hat *Chandler* reflects, I think, is an essential unwillingness to accept the true implications of what the Supreme Court said in *Brown v. Gardner*.” Allen, *supra* note 14, at 160. Additionally, consider the fact that when *Gardner's* Presumption first originated, it might very well have been intended to be used simply as every other remedial statute and not as a super-strong presumption in favor of veterans. See Jellum, *supra* note 14, at 69.

²³³ See *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (per curiam) (raising *Gardner's* Presumption for the first time in a petition for rehearing); *Sursely v. Peake*, 22 Vet. App. 21, 23 (2007), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009); *Smith v. Nicholson*, 19 Vet. App. 63, 69 (2005), *rev'd*, 451 F.3d 1344 (Fed. Cir. 2006); *DeBeaord v. Principi*, 18 Vet. App. 357, 362 (2004); *Theiss v. Principi*, 18 Vet. App. 204, 206 (2004); *Jones v. Principi*, 16 Vet. App. 219, 222-23 (2002) (noting that for the first time *Gardner's* Presumption was raised in a veteran's brief). *But see Osman v. Peake*, 22 Vet. App. 252, 254 (2008) (raising the precursor to *Gardner's* Presumption in an amicus brief).

²³⁴ Jellum, *supra* note 14, at 120-21.

²³⁵ *Id.*

First, taking *Gardner's* Presumption out of the courts eliminates the well-documented conflict with agency deference.²³⁶ Eliminating this conflict will provide needed clarity to judges, commentators, and veterans law experts who have repeatedly expressed concern over the somewhat absurd consequences to which the presumption has given rise. Moreover, it will ameliorate an aspect of veterans' law that has generated great controversy and uncertainty. Settling it allows the veterans law experts to focus on other areas and continue developing truly veteran-friendly jurisprudence.

Second, Professor Jellum's solution gives VA more freedom to execute its mission to serve veterans. VA can publish bright-line regulations without fear of veteran-litigants challenging its interpretation, reducing the amount of time applications spend at the RO and BVA levels and reducing the amount of front-line RO adjudicators necessary.²³⁷ This move would ensure that veterans receive their benefits more quickly, and it would also free VA to use money it normally spends hiring more front-line adjudicators and BVA attorneys to potentially hire medical staff and to further streamline and improve the claims process.

Third, this solution broadens the understanding of resolving interpretive doubt in favor of veterans and what it means to be veteran friendly. Under this proposal, VA could explain its thought process when it interprets statutes, giving public voice to its competing goals—serving veterans within the confines of financial and staff resources.

Throughout its history, VA has enjoyed a complicated, somewhat contentious, relationship with the public and Congress.²³⁸ Many of the misunderstandings revolve around the disconnect between what Congress and the public expect from VA and what VA can actually provide with its limited resources. Greater transparency regarding VA's struggles to provide care for our nation's more than 21.8 million veterans could potentially ameliorate these misunderstandings, while providing more information to citizens and Congress. If the public understands how and why a certain law or regulation will benefit veterans, they have more knowledge from which to respond to the law by commenting during a regulation's notice and comment period or by voting out a presidential administration.²³⁹ Placing *Gardner's* Presumption at VA's level would thus create more transparency within the VA benefits system and allow Congress and the public to better respond to the needs of VA in its quest to serve veterans.

Fourth, removing *Gardner's* Presumption as an avenue for appeals should decrease the amount of appeals filed, resulting in the CAVC and Federal Circuit resolving many veterans' appeals much faster. As it stands now, many veterans pursue unwinnable appeals because they believe *Gardner's* Presumption dictates a decision in their favor.²⁴⁰ In doing so, they take up courts' time with confusing arguments that do not make legal sense. Without having to resort to lengthy explanations regarding *Gardner's* Presumption, the courts should be able to process claims more smoothly and consistently.

²³⁶ See sources cited *supra* note 14.

²³⁷ See Ridgway, *Changing Voices*, *supra* note 14, at 1185-86.

²³⁸ See *id.* at 1186-89.

²³⁹ See *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 865-66 (1984) (finding that agencies should have the power to interpret their own policies so that citizens may voice approval or disapproval by voting).

²⁴⁰ Jellum, *supra* note 14, at 123; see *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (per curiam) (raising *Gardner's* Presumption for the first time in a petition for rehearing); *Sursely v. Peake*, 22 Vet. App. 21, 23 (2007), *rev'd*, 551 F.3d 1351 (Fed. Cir. 2009); *Smith v. Nicholson*, 19 Vet. App. 63, 69 (2005), *rev'd*, 451 F.3d 1344 (Fed. Cir. 2006); *DeBeaord v. Principi*, 18 Vet. App. 357, 362 (2004); *Theiss v. Principi*, 18 Vet. App. 204, 206 (2004); *Jones v. Principi*, 16 Vet. App. 219, 222-23 (2002) (noting for the first time that the issue was raised in a veteran's brief). *But see Osman v. Peake*, 22 Vet. App. 252, 254 (2008) (raising the precursor to *Gardner's* Presumption in an amicus brief).

Fifth, it will allow VA to issue more clarifying explanations without fear that a court will overturn them because a veteran-litigant presents a reasonable competing interpretation. This, in turn, will make the benefits application and decision-making process easier for veterans to navigate and understand because explanatory interpretations make the law more clear.²⁴¹ VA's straightforward interpretations of regulations, moreover, will assist front-line adjudicators and BVA attorneys to more easily, accurately, and efficiently draft initial decisions on a veteran's claim.²⁴² Additionally, the promulgation and existence of clear, straightforward rules and regulations should make benefits decisions more uniform, as greater clarity in rulemaking and adjudication offers much less room for interpretation and inconsistency by front-line adjudicators.²⁴³

Lastly, and perhaps most importantly, the laudable directive of *Gardner's* Presumption itself will hopefully spur VA to develop more veteran-friendly interpretations and regulations in its never-ending mission to fulfill President Lincoln's command to serve veterans.

CONCLUSION

Gardner's Presumption conflicts with principles of agency deference, and for many years this jurisprudential conflict has resulted in actual conflict, with courts ruling every which way. Yet in the past five to ten years, the Federal Circuit and CAVC have more or less agreed that agency deference trumps *Gardner's* Presumption. But dissent remains, and a common law consensus does not have the same force as a pronouncement that agency deference trumps *Gardner's* Presumption. Because of this, the status of *Gardner's* Presumption is still considered an open question, as demonstrated most recently by Judge O'Malley's plea for the Supreme Court to address this conflict.

Gardner's Presumption throws the veterans' benefits system into chaos by reducing VA's power to employ its subject-matter expertise to implement regulations and statutes, contributing to the delays in awards of veterans' benefits and making veterans law more procedurally complicated. In almost every case in which a court rules for a veteran because of *Gardner's* Presumption, the veteran before the court wins his case, but veterans, as a class, lose.

Thus, VA needs to resolve the conflict by explaining, in each regulation and statute it passes, how that regulation or statute benefits veterans, as a whole. By doing so, it creates greater transparency, improves veterans' and the public's trust in VA, and allows VA to best utilize its expertise in creating regulations and statutes that improve the lives of as many veterans as possible. While that suggestion seems radical, it is no less radical than the evolution of *Gardner's* Presumption—a presumption that has next to no legal or precedential foundation for its existence. VA, not the courts, is the entity in the best position to help veterans, and it should be allowed to do so.

Judge O'Malley inquired as to “which interpretation controls,” agency deference or *Gardner's* Presumption. Common law definitively states that agency deference interpretations control. But as long as Judge O'Malley finds it necessary to ask that question, the conflict of *Gardner's* Presumption lives on. That cannot be. Resolve the conflict by putting *Gardner's* Presumption in the hands of the agency best prepared and capable of helping veterans—VA.

²⁴¹ “The law governing veterans' benefits has grown increasingly complex, which makes the assistance of a professional increasingly necessary.” Dowd, *supra* note 26, at 55.

²⁴² Ridgway, *Changing Voices*, *supra* note 14, at 1187-91.

²⁴³ *Id.*