

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

Michael P. Allen¹

INTRODUCTION

In 2013, we will commemorate twenty-five years of the judicial review of veterans' benefits determinations. In 1988, Congress enacted the Veterans' Judicial Review Act (VJRA).² Before this time, the Veterans Administration (VA)³ had operated in "splendid isolation," because in almost all cases, judicial review of the VA's decisions was statutorily precluded.⁴ The anniversary of the VJRA provides a fitting time for all those interested in the provision of benefits to veterans (and the review of the denial of requests for such benefits) to reflect on the system that exists today and how it can be improved. After all, everyone associated with the provision of benefits to the men and women who served this nation is carrying out the call of President Abraham Lincoln in his

¹ Professor of Law, Director of the Veterans Law Institute and Associate Dean for Faculty Development and Strategic Initiatives, Stetson University College of Law. The impetus for this Essay was a talk I delivered at a June 2012 seminar of the Court of Appeals for Veterans Claims Bar Association. I wish to thank the Bar Association for its invitation to speak at the seminar and for the comments I received at the event. I also thank the staff of the *Veterans Law Review* for their assistance in connection with the publication of this Essay.

² Veterans' Judicial Review Act of 1988 (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

³ Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (codified as amended in scattered sections of 38 U.S.C.). The Veterans Administration (VA) was elevated to a cabinet-level department and renamed the Department of Veterans Affairs (DVA) in 1988 at the same time Congress enacted the VJRA. *Id.*

⁴ *See Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.'" (quoting H.R. REP. NO. 100-963, pt. 1, p. 10 (1988))).

famous second inaugural address.⁵ This assessment of how well we are heeding President Lincoln’s call is even more urgent in a time in which veterans of our current conflicts are seeking benefits at a rate far higher than veterans of earlier conflicts.⁶

The genesis for this Essay was a request from the Court of Appeals for Veterans Claims Bar Association (“the Bar Association” or “the CAVC Bar Association”) to speak at a seminar it hosted in June 2012. The Bar Association asked that I discuss certain instances in which I believed that the United States Court of Appeals for Veterans Claims (CAVC) had made an incorrect decision. Of course, this was an attractive offer because there is nothing better as lawyers than playing Monday morning quarterback with the decisions judges make. When a judge decides a case in a way lawyers disagree with, lawyers are generally quite happy to explain, often in excruciating detail, why the decision is so clearly wrong. Yet, a lawyer doing so, much like the true Monday morning quarterback, has it easy. He or she has not had to actually play the game.

As I was preparing for the CAVC Bar Association’s challenge, I realized that there was much more to the task. I began to understand that the appeals on which I focused were cases in which my “disagreement” with the CAVC was really a concern about more systemic issues. As a result, my goal changed to one that more focused on considering the system as a whole at this moment of commemoration.

With this new goal in mind, what I did was select three appeals from the past year or so in which both the CAVC and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have each rendered a decision. Sometimes the courts

⁵ See President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in ABRAHAM LINCOLN, *SELECTED SPEECHES AND WRITINGS* 449, 450 (First Vintage Books, The Library of America ed. 1992) (noting that President Lincoln famously stated that the nation should “care for him who shall have borne the battle and for his widow, and his orphan”).

⁶ See Marilyn Marchione, *Nearly Half of New Vets Seek Disability*, MSNBC (May 27, 2012, 3:35PM), http://www.msnbc.msn.com/id/47583746/ns/health-health_care/.

agreed with each other, and sometimes they did not. These appeals do not necessarily represent the decisions I would rank as the most important ones in veterans law in this period; however, they do provide a means by which we can consider some of the important systemic issues that confront the veterans' benefits system. They also permit a respectful critique of the judicial review of this system. My ultimate goal is to at least present some of the major systemic issues that are on the horizon.

This Essay proceeds as follows: In Section I, I briefly describe the appeals I have selected to discuss and the judicial decisions rendered in those appeals; In Section II, I provide a synthesis of the issues these cases, both individually and collectively, raised about veterans law as well as provide some of my own reflections on these issues; Finally, I set forth a brief conclusion and some thoughts about the future.

I. THE APPEALS

In this section, I discuss the facts and the legal issues in the three appeals I will analyze in this Essay.

A. *Byron v. Shinseki*⁷

Dennis Byron was a U.S. Army Veteran who served at a number of facilities in which he was exposed to radiation as a result of atomic testing.⁸ The Veteran died in 1971 from cancer—intra-abdominal metastases due to reticulum cell sarcoma.⁹ While the procedural history of the case is complicated, for present purposes it is possible to simplify matters. When the Veteran died in 1971, his spouse filed an application for

⁷ *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683 (Vet. App. June 20, 2011), *aff'd*, *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012).

⁸ *Byron*, 2011 WL 2441683, at *1.

⁹ *Id.*

dependency and indemnity compensation (DIC) or death pension.¹⁰ She was awarded a death pension shortly after applying, but the DIC claim was not adjudicated.¹¹

In the mid-1990s, several decades after Ms. Byron's DIC claim was filed, she submitted a number of pieces of evidence concerning her husband's exposure to radiation while in-service, as well as medical opinions concerning the causal connection between that exposure and Mr. Byron's cause of death.¹² In August 1996, she also filed a request to reopen what she believed to have been a denial of her 1971 claim for DIC benefits.¹³ After several years passed, in 2003, the Regional Office (RO) granted Ms. Byron's DIC application based on presumptive service connection and assigned an effective date of August 14, 1995, one year prior to the filing of Ms. Byron's request to reopen.¹⁴

Ms. Byron appealed the effective date determination to the Board of Veterans' Appeals (Board), and the Board affirmed in a September 2006 decision.¹⁵ Eventually, the CAVC remanded the matter back to the Board. After additional proceedings in which Ms. Byron submitted additional medical evidence, the Board in a December 2009 decision determined that she was entitled to an effective date of May 1, 1988, the date on which the Radiation-Exposed Veterans Compensation Act of 1988 went into effect.¹⁶

Ms. Byron appealed again to the CAVC the Board's December 2009 decision as to the effective date. She argued, and the Secretary agreed, that the Board had erred by not considering whether the evidence in the record established direct service

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *1-2.

¹³ *Id.* at *2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *2-3.

connection, something that could lead to an effective date earlier than the 1988 enactment of the statute providing for presumptive service connection for this type of injury.¹⁷ In a single judge opinion, the CAVC also agreed that the Board had committed error by not considering direct service connection.¹⁸

For present purposes, *Byron* is significant not for the point about direct versus presumptive service connection. Rather, the case's significance comes from the question of remedy.¹⁹ Ms. Byron argued that the CAVC should reverse the Board's decision instead of vacating it and remanding the matter for further adjudication.²⁰ The Secretary argued against an outright reversal.²¹

The CAVC held that vacation and remand was the correct remedy.²² Judge Schoelen based the CAVC's decision on the ground that the determination of whether direct service connection was established by the evidence of record and the effective date of any award on that basis were questions of fact.²³ As the CAVC stated: "The Court only has the authority to decide whether factual determinations are clearly erroneous or whether they have not been supported by an adequate statement of reasons or bases The Court is not positioned to make findings about factual determinations yet to be made."²⁴

Ms. Byron then appealed to the Federal Circuit alleging legal error in the CAVC's decision to vacate and remand instead of reverse.²⁵ The Federal Circuit first held that it had jurisdiction to

¹⁷ *Id.* at *3-4.

¹⁸ *See id.* at *3-6.

¹⁹ *See id.* at *6 (discussing the differences between remand and reversal).

²⁰ *Id.* at *6.

²¹ *Id.* at *4.

²² *Id.* at *7.

²³ *Id.* at *6.

²⁴ *Id.* (citation omitted); *see also* 38 U.S.C. § 7261(c) (2006) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court [of Veterans Appeals].").

²⁵ *Byron v. Shinseki*, 670 F.3d 1202, 1204 (Fed. Cir. 2012).

consider the remand order even though it was not a final resolution of the full claim.²⁶ Turning to the merits of Ms. Byron's claim, the Federal Circuit agreed with the CAVC that remand was the appropriate remedy.²⁷ As Judge Moore stated in the opinion for the Federal Circuit:

It is not enough for Ms. Byron to claim that all of the evidence of record supports her position. The Board must still make an initial determination of whether Ms. Byron has sufficiently supported a claim for an earlier effective date. It may well be that the Board concludes that Ms. Byron has established these facts. That, however, is precisely what needs to be done by the fact-finding agency in the first instance, not by a court of appeals.²⁸

Ms. Byron sought re-hearing en banc at the Federal Circuit; however, her petition was denied.²⁹

B. Chandler v. Shinseki³⁰

The issue in *Chandler* concerned the Veteran's claim for a special monthly pension under 38 U.S.C. § 1521(e).³¹ Mr. Chandler was a Navy Veteran who served in the Korean Conflict.³² Beginning in 1992, when he was fifty-seven, Mr. Chandler began to receive a pension based on non-service related disabilities that

²⁶ *Id.* at 1205 (applying a three-part test to identify cases in which remand orders are appealable under *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002)).

²⁷ *Id.* at 1205-06.

²⁸ *Id.* at 1206 (citation omitted).

²⁹ Claimant – Appellant Lady Louise Byron's Petition for Rehearing En Banc, *Bryon v. Shinseki*, 670 F.3d 1202 (Fed. Cir. Apr. 2, 2012) (No. 2011-7170); Rehearing En Banc Denied, *Bryon v. Shinseki*, 670 F.3d 1202 (Fed. Cir. June 19, 2012) (No. 2011-7170).

³⁰ *Chandler v. Shinseki*, 24 Vet. App. 23 (2010) (en banc), *rev'd*, *Chandler v. Shinseki*, 676 F.3d 1045 (Fed. Cir. 2012).

³¹ *Chandler*, 676 F.3d at 1046.

³² *Id.*

“render him permanently and totally disabled.”³³ None of his disabilities standing alone, however, were rated at 100%.³⁴

In 2006, when he was seventy-one, Mr. Chandler applied for an enhanced pension rate under § 1521(e).³⁵ The Board affirmed the RO’s denial of Mr. Chandler’s request because it determined that the Veteran had not satisfied the requirement in § 1521(e) that a veteran have “a disability rated as permanent and total.”³⁶ Over two dissenting opinions, the en banc CAVC reversed that determination,³⁷ but the Federal Circuit, in turn, reversed the CAVC’s decision.³⁸

To understand *Chandler*, it is necessary to step back to consider the relevant statutory provisions at issue. As the Federal Circuit described, “Section 1521 provides a pension for wartime veterans with non-service-connected disabilities who meet certain requirements”³⁹ one of which is that the veteran “is *permanently and totally disabled* from non-service connected disability.”⁴⁰ The basic rate for this pension is set in § 1521(b). However, a veteran may receive a greater pension under § 1521(e) if, among other things, “the veteran has a disability rated as permanent and total.”⁴¹

Mr. Chandler was receiving a pension under § 1521(a) at the rate prescribed by § 1521(b) when he sought an increase in his pension amount to that set by § 1521(e).⁴² His argument was, essentially, that a different statutory section led to that result. Specifically, the argument was premised on 38 U.S.C. § 1513.⁴³

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Chandler v. Shinseki*, 24 Vet. App. 23, 24 (2010) (en banc).

³⁸ *Chandler*, 676 F.3d at 1050.

³⁹ *Id.* at 1048.

⁴⁰ *Id.* (citing 38 U.S.C. § 1521(a) (2006)).

⁴¹ *Id.* (citing § 1521(e)).

⁴² *Id.* at 1046.

⁴³ *Id.*

As a general matter, § 1513 provides for pensions for wartime veterans based on age as opposed to the § 1521 basis tied to disability.⁴⁴ Section 1513 states, “The Secretary shall pay to each veteran of a period of war who is 65 years of age or older and who meets the service requirements of section 1521 . . . pension at the rates prescribed by section 1521.”⁴⁵ Importantly, § 1513 provides that a veteran need not establish the “permanent and total disability requirement” of § 1521.⁴⁶ Thus, Mr. Chandler argued that the exclusion in § 1513(a) meant that he did not need to establish that he had a single disability rated at 100% in order to get increased compensation under § 1521(e), even if one assumed that such was the requirement as an initial matter.⁴⁷

The CAVC *sua sponte* elected to consider the appeal en banc.⁴⁸ In a 5-2 decision, the CAVC ruled in Mr. Chandler’s favor.⁴⁹ However, to understand the CAVC’s decision additional information is needed. In *Hartness v. Nicholson*,⁵⁰ the CAVC had considered the interplay between §§ 1513 and 1521 but in a slightly different context from the situation in *Chandler*. In *Hartness*, the Veteran had argued that he was entitled to the higher rate for a pension under § 1521(e) even though he did not have a single disability rated at 100%.⁵¹ Mr. Hartness’s pension was one he sought under § 1513, in other words, he applied for a pension after he was sixty-five, unlike Mr. Chandler who already had a pension in place under § 1521 based on disability alone.⁵²

⁴⁴ 38 U.S.C. §§ 1513, 1521.

⁴⁵ *Id.* § 1513(a).

⁴⁶ *Id.*

⁴⁷ *Chandler v. Shinseki*, 24 Vet. App. 23, 24 (2010) (en banc). It is worth noting that there was no regulatory guidance relevant to the intersection of 38 U.S.C. §§ 1513 and 1521.

⁴⁸ *See id.* at 23 (listing all seven (at that time) United States Court of Appeals for Veterans Claims (CAVC) Judges as participants in the decision).

⁴⁹ *Id.* at 31.

⁵⁰ 20 Vet. App. 216 (2006), *overruled by* *Chandler v. Shinseki*, 676 F.3d 1045 (Fed. Cir. 2012).

⁵¹ *Id.* at 218.

⁵² *Compare Chandler*, 24 Vet. App. at 24, *with Hartness*, 20 Vet. App. at 217-18.

In *Hartness*, the CAVC held that § 1513(a)'s exclusion of the requirement that a veteran establish that he or she had a "permanent and total disability" meant that a veteran seeking a wartime-service based pension based on age did not have to establish that he or she had "a disability rated as permanent and total" to obtain an increased pension, as would otherwise be required under § 1521(e).⁵³

In *Chandler*, the CAVC determined that to interpret these statutory provisions in such a manner that a veteran like Mr. Hartness, who first receives a pension based on age under § 1513, would get the higher pension amount under § 1521(e) without showing a single disability, but that a veteran who already was receiving a pension under § 1521 could not do so would be an "absurd" result.⁵⁴ As such, the CAVC determined that the rule established in *Hartness* governed the question regardless of whether a veteran sought a pension initially only on the basis of age under § 1513 or was already receiving a pension under § 1521 based on a disability.⁵⁵

The en banc CAVC recognized that the absurdity of the differing results in *Chandler* and *Hartness* was, in some measure at least, the result of *Hartness*.⁵⁶ In other words, if *Hartness* was not correctly decided, the tension would not be present (or at least it would be a different tension). As such, the CAVC engaged in an extensive discussion of why the principle of *stare decisis* did not counsel in favor of overruling *Hartness*.⁵⁷ That discussion was necessary because Chief Judge Kasold, joined by former

⁵³ *Hartness*, 20 Vet. App. at 221-22.

⁵⁴ *Chandler*, 24 Vet. App. at 27. The Secretary had issued VA Fast Letter 06-28 interpreting *Hartness* after it was issued. That letter directed VA adjudicators that *Hartness* applied only in its factual context and, therefore, did not govern the situation presented in *Chandler*, where a veteran was already receiving a pension under § 1521 prior to turning sixty-five and then sought an increased amount after turning sixty-five. *Id.* at 26.

⁵⁵ *Id.* at 30.

⁵⁶ *Id.* at 27.

⁵⁷ *Id.* at 28-31.

Chief Judge Greene, dissented, arguing that *Hartness* was wrongly decided.⁵⁸ Judge Davis wrote a concurring opinion.⁵⁹ Interestingly, Judge Davis based much of his decision on the fact that the statute was ambiguous and, as such, the canon of construction under *Brown v. Gardner*—that ambiguous statutes are to be construed in favor of the veteran—supported reversal of the Board.⁶⁰

The Secretary appealed to the Federal Circuit.⁶¹ The Federal Circuit did not address the issues concerning *stare decisis* that consumed a considerable part of the CAVC’s decision. Instead, the Federal Circuit held that the CAVC had been incorrect in its decision in *Hartness*.⁶² Once that impediment was removed, the Federal Circuit held that the two statutory sections (i.e., §§ 1513 and 1521) could be read together.⁶³ Simply put, the reference in § 1513 to excluding the requirement of “permanent and total disability” referred only to that phrase in the initial qualifying section in § 1521(a).⁶⁴ It did not alter the separate requirement under § 1521(e) that a veteran needed to show “a disability rated as permanent and total” for an increased pension amount.⁶⁵ Thus, the Board’s original decision, which was adverse to the Veteran, was ultimately affirmed.

⁵⁸ *Id.* at 33-36.

⁵⁹ *Id.* at 31-33.

⁶⁰ *Id.* Judge Davis noted at the beginning of his opinion that “[t]he plain language [of the statutes at issue] is inexact and unclear. Contrary to the dissent’s assertion, the answer, ultimately, is that Congress’s intent is ambiguous and that ambiguity must be resolved in favor of the veteran.” *Id.* at 31. He concluded his opinion by commenting that “[w]hether or not Congress ultimately addresses the legislative ambiguity extant here, it is not the province of this Court to draft corrective legislation disguised as an opinion.” *Id.* at 33.

⁶¹ *Chandler v. Shinseki*, 676 F.3d 1045, 1046 (Fed. Cir. 2012).

⁶² *Id.* at 1046, 1050.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

C. *Guerra v. Shinseki*⁶⁶

Guerra v. Shinseki also deals with an issue related to whether a combined set of disabilities means the same thing as a single disability rated at 100%. However, the issue arose in a different context than *Chandler*, and that difference is significant in several respects. Mr. Guerra was a Marine Corps Veteran who suffered multiple service-connected injuries resulting from a single combat incident.⁶⁷ None of Mr. Guerra's disabilities was rated at 100%, but his combined disability rating was 100%.⁶⁸ Mr. Guerra sought special monthly compensation under 38 U.S.C. § 1114(s).⁶⁹ The Board denied the claim in December 2007 and the CAVC affirmed that denial.⁷⁰ The key issue was whether the statute required that Mr. Guerra have a single disability rated at 100%, or whether a combined rating of total disability would suffice for the special monthly compensation at the rate provided in § 1114(s).⁷¹ The CAVC held that establishing a combined rating did not suffice.⁷² Mr. Guerra appealed to the Federal Circuit and that court affirmed the CAVC.⁷³

⁶⁶ *Guerra v. Shinseki*, No. 08-0223, 2010 WL 1140882 (Vet. App. Mar. 26, 2010), *aff'd*, *Guerra v. Shinseki*, 642 F.3d 1046 (Fed. Cir. 2011).

⁶⁷ *Guerra*, 642 F.3d at 1048.

⁶⁸ *Id.*

⁶⁹ *Id.* Section 1114(s) states:

If the veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or, (2) by reason of such veteran's service-connected disability or disabilities, is permanently housebound, then the monthly compensation shall be \$2,993. For the purpose of this subsection, the requirement of "permanently housebound" will be considered to have been met when the veteran is substantially confined to such veteran's house (ward or clinical areas, if institutionalized) or immediate premises due to a service-connected disability or disabilities which it is reasonably certain will remain throughout such veteran's lifetime.

38 U.S.C. § 1114(s) (2006).

⁷⁰ *Guerra*, 2010 WL 1140882, at *1-2.

⁷¹ *Id.* at *2.

⁷² *Id.*

⁷³ *Guerra*, 642 F.3d at 1048, 1052.

As described above, the key issue on appeal was whether Mr. Guerra had “a service-connected disability rated as total” as required by § 1114(s). Unlike the situation at issue in *Chandler*, here, the VA had issued a departmental regulation interpreting § 1114(s).⁷⁴ The implementing regulation provided that “[t]he special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent.”⁷⁵ The majority of the Federal Circuit panel noted that “[w]hile the language of subsection 1114(s) is not entirely free from ambiguity, we are compelled to defer to the [VA]’s interpretation of subsection 1114(s), and we uphold the decision of the Veterans Court on that ground.”⁷⁶ The majority found that such deference was required under the *Chevron* Doctrine.⁷⁷ It explained, “the rule of *Chevron* provides that when an agency ‘has statutory authority to issue regulations [and] invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.’”⁷⁸

Judge Gajarsa dissented in *Guerra*.⁷⁹ As he explained in summary: “Because, in my view, the language of § 1114(s) is clear [in supporting the veteran’s position], it is unnecessary to rely on the related regulation [under *Chevron*]. To the extent that any ambiguity does exist in § 1114(s)—as the majority suggests—it should be resolved in favor of the veteran [under *Brown v. Gardner*].”⁸⁰ The majority responded to Judge Gajarsa’s invocation of the *Brown v. Gardner* presumption by noting that

⁷⁴ See *supra* note 54 (distinguishing from *Chandler* in which the VA had not issued any regulatory guidance concerning the meaning of the statutory provision at issue in that case).

⁷⁵ 38 C.F.R. § 3.350(i) (2011).

⁷⁶ *Guerra*, 642 F.3d at 1049.

⁷⁷ *Id.* at 1049 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

⁷⁸ *Id.* (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008)).

⁷⁹ *Id.* at 1052-55.

⁸⁰ *Id.* at 1054 (citations omitted).

the Federal Circuit had previously “rejected the argument that the pro-veteran canon of construction overrides the deference due to the DVA’s reasonable interpretation of an ambiguous statute.”⁸¹ At the end of the day, Mr. Guerra did not prevail.

In this section, I described the facts and holdings of the three cases on which I will analyze. In the next section, I turn to the issues these cases raise both individually and collectively.

II. THE ISSUES IMPLICATED IN THE APPEALS

In this section of the Essay, I highlight certain issues concerning veterans’ law raised in *Byron*, *Chandler*, and *Guerra* collectively. This section is organized by issue rather than by each appeal. I aim to flag the issues of importance from these cases and how they implicate serious questions as we move forward.

A. Seemingly Unending Proceedings or a Modern Day *Jarndyce v. Jarndyce*⁸²

One thing that comes through loud and clear when considering these cases as a group is that for many veterans in the benefits system there are serious delays in the adjudication of claims. I recognize that this is an obvious point, and one that is the subject of much discussion. Nevertheless, it is worth stepping back to acknowledge the serious impact that the systemic delays in the adjudication of benefit claims can have on the people involved in the process. Mr. Chandler’s claim was pending for at least six years from the time he filed

⁸¹ *Id.* at 1051 (citing *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003)). It is interesting that the CAVC’s decision in *Guerra* did not cite either *Chevron* or *Brown*. See *Guerra v. Shinseki*, No. 08-0223, 2010 WL 1140882 (Vet. App. Mar. 26, 2010).

⁸² The reference is to Charles Dickens’s fictional case *Jarndyce v. Jarndyce*, a case that had been pending for so long in the English Chancery Court that, among other things, “[i]nnumerable children have been born into the cause; innumerable young people have married into it; [and] innumerable old people have died out of it.” CHARLES DICKENS, BLEAK HOUSE 2-3 (Bradbury and Evans 1853).

at the RO until he ultimately lost at the Federal Circuit.⁸³ In the context of ordinary civil litigation, this is a long time for a resolution of a dispute; however under the VA's administrative review process, Mr. Chandler's case moved at lightning speed compared to the other cases discussed herein. Mr. Guerra's claim was pending for twelve years, before he too, ultimately lost his appeal at the Federal Circuit.⁸⁴ But Ms. Byron "wins" the contest for time to resolution. Conservatively speaking, her claim has been pending for sixteen years, although it is possible to view it as pending for over forty years.⁸⁵

An extended discussion of the causes of these delays is well beyond the scope of this Essay. Nevertheless, one fundamental point is obvious. The delays in the system unquestionably undermine the confidence of veterans in the adjudication of their claims. Indeed, a concern about rampant, systemic delays was a driving force behind recent litigation ultimately adjudicated in the United States Court of Appeals for the Ninth Circuit, which sought to impose court-monitored injunctive relief on the VA.⁸⁶ While the en banc Ninth Circuit ultimately ruled against the veterans' groups mounting the litigation,⁸⁷ the fact that such groups took this drastic action is powerful evidence of the very real problem that lies at the heart of the veterans' benefits system. The three cases discussed above are merely a reflection of that much broader and deeper problem.

⁸³ See *Chandler v. Shinseki*, 676 F.3d 1045, 1046 (Fed. Cir. 2012) (noting that Mr. Chandler applied to VA in 2006 for enhanced pension).

⁸⁴ *Guerra*, 642 F.3d at 1046 (noting the date of the United States Court of Appeals for the Federal Circuit's (Federal Circuit) 2011 decision); *Guerra*, 2010 WL 1140882, at *1 (noting that the claim at issue was filed with the Regional Office (RO) in June 1999).

⁸⁵ See *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *2 (Vet. App. June 20, 2011) (noting that the appellant filed a petition to reopen her earlier claim for dependency and indemnity compensation (DIC) benefits in August 1996). However, one could also start the clock in 1971 when she filed her initial request for DIC. See *id.* at *1 (noting that she filed an application for DIC or death pension in September 1971, the month after her husband died).

⁸⁶ See *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012).

⁸⁷ See *id.* at 1036-37.

B. Remands, Remands and More Remands

A significant cause of systemic delays clearly is the high number of remands that occur at various stages of review.⁸⁸ There are remands from the Board to ROs, from the CAVC to the Board and then, in many cases, from the Board to the RO again. This process is aptly described as the “hamster wheel,”⁸⁹ a term most certainly not of endearment. Whatever term is used, however, the high number of remands in the system is a critical issue.⁹⁰

Byron raises two distinct points concerning remands. The first, and most important, one is the issue that split the parties in the case—how broad is the scope of the CAVC’s authority to reverse a Board decision and order the award of benefits. As previously discussed, the Secretary and Ms. Byron agreed that the Board committed legal error by not considering direct service-connection for the claim at issue.⁹¹ The CAVC, and then the Federal Circuit, rejected Ms. Byron’s argument that the state of the record was such that a remand for fact-finding was not required.⁹²

⁸⁸ It is difficult to discern precisely how many appeals lead to a remand from the CAVC to the Board of Veterans’ Appeals (Board), and, even if that were possible, the number of such remands that resulted from an adjudication versus a joint motion. *See generally* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANN. REP.: OCT. 1, 2010 TO SEPT. 30, 2011 (FISCAL YEAR 2011) (providing workload statistics for the CAVC, to include dispositions), available at http://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_FINAL_Feb_29_2012_1PM_.pdf. As reported recently by the NATIONAL LAW JOURNAL, however, “[e]xperts inside and outside of the [CAVC] generally agree that it sends 70 percent of the decisions back to the [B]oard.” Marcia Coyle, *Veterans Seek End to Repeat Remands*, NAT’L L.J., May 7, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551931048&Veterans_seek_end_to_repeat_remands&slret urn=20120726121749.

⁸⁹ *See, e.g.*, *Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting) (discussing the “hamster-wheel reputation of veterans law”).

⁹⁰ *See* 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 (2009) (discussing remands before the CAVC).

⁹¹ *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *4 (Vet. App. June 20, 2011).

⁹² *Id.* at *6-7; *see also* *Byron v. Shinseki*, 670 F.3d 1202, 1205-06 (Fed. Cir. 2012).

In my view, both the CAVC and the Federal Circuit reached the “correct” result under existing law. That is, as matters have developed, the statutory prohibition on the CAVC’s finding of facts⁹³ has been construed broadly.⁹⁴ To say that the appeals were decided “correctly” on existing law is not necessarily the same thing as saying that the decisions are right. I am increasingly concerned that the veterans’ benefits system is seriously flawed as a result of the almost inconceivable delays some veterans face in their quest for benefits, or even simply a final resolution of their claims. A significant part of the cause of such demands is the current state of remand practices. One solution would be to wait for Congress to address the issue in a systemic way, which appears to have been the approach thus far. For unbeknownst reasons, however, a legislative fix has not been forthcoming.

Thus, the courts in the veterans’ benefits system find themselves at something of a critical decision point. One course of action is to maintain the current practice of construing the prohibition on CAVC fact-finding broadly.⁹⁵ Indeed, the two decisions in *Byron* represent that thinking.⁹⁶ The other option, however, is to revisit what is ultimately a question of statutory interpretation: what does § 7261(c) really mean? In my estimation, it is possible to construe that section more narrowly, especially when considering that Congress has specifically granted the CAVC the authority to reverse Board decisions outright.⁹⁷

⁹³ See 38 U.S.C. § 7261(c) (2006) (“In no event shall findings of fact made by the Secretary or the Board of Veterans’ Appeals be subject to trial de novo by the C[AVC].”).

⁹⁴ See, e.g., *Hensley v. West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000) (finding that the proper remedy was to remand the case to the Board for further development and application of the correct law).

⁹⁵ 38 U.S.C. § 7261(c).

⁹⁶ *Byron*, 670 F.3d at 1205-06; *Byron*, 2011 WL 2441683, at *6.

⁹⁷ 38 U.S.C. § 7252(a) (“The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”).

A complete articulation of a theory by which judicial reinterpretation of the CAVC's review authority could be accomplished is beyond the scope of this Essay.⁹⁸ However, it is possible to sketch the outlines of such an approach. If the CAVC determines that the Board has erred in some manner, and that the evidence in the record is such that there is an "overwhelming likelihood" that on basis of the evidence before the Board benefits should be awarded, the CAVC should reverse the Board instead of remanding for additional fact finding.⁹⁹ Such an approach is, in my view, consistent with the statutory prohibition on a *de novo* finding of facts in the CAVC.¹⁰⁰

There are many cases in which the question of whether there is an "overwhelming likelihood" that the veteran will prevail will require judgment calls. But the mere fact that there are cases that will fall close to the line that is drawn does not mean that the system would be unworkable. It simply means that there will be close cases, something that will exist whenever any line is drawn. Moreover, such a determination would not be unprincipled. A rule in which the CAVC could adopt would ask whether, on the state of the record, a finding by the Board against the veteran would leave the CAVC on appellate review with the "definite and firm conviction that a mistake has been committed."¹⁰¹ The CAVC uses such a standard to assess actual findings of fact the Board has made.¹⁰²

⁹⁸ See Claimant-Appellant Lady Louise Byron's Petition for Rehearing En Banc, *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (No. 2011-7170), 2012 WL 1357625. It has been reported that the Federal Circuit has called for a response from the Secretary with respect to the petition for an en banc request. See Coyle, *supra* note 88.

⁹⁹ For present purposes, I am using the simple example of an award of benefits. However, the approach I outline above could be used in connection with other matters as well, such as the assignment of an effective date.

¹⁰⁰ 38 U.S.C. § 7261(c).

¹⁰¹ See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (setting forth the federal standard for clearly erroneous review of factual findings).

¹⁰² See, e.g., *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *6 (Vet. App. June 20, 2011) (noting that the CAVC "only has the authority to decide whether factual determinations are clearly erroneous").

It is true that this proposal would be a hypothetical review of a finding of fact not actually made. The point, however, is that if the CAVC were to conclude that on the face of the record a finding of fact adverse to the veteran would be clearly erroneous, there is no need for a remand.¹⁰³

On the other hand, some may argue that this proposal finds no support in the law. As a general matter, in administrative law, fact-finding is the province of the relevant agency. However, there are certainly examples in which a designated fact-finder is removed from the equation due to a judicial decision. One example is the recent evolution of the federal pleading standards under Federal Rule of Civil Procedure 8(a)(2).¹⁰⁴ The Supreme Court made clear that a federal district judge—even in the context of a case in which there is a jury trial right—has the power to declare that a plaintiff’s allegations, even if assumed to be true, do not state a claim on which relief can be granted.¹⁰⁵ The Supreme Court further said that such a determination is to be based on “judicial experience and common sense.”¹⁰⁶ If this can be done when a jury would be the fact-finder, I see no reason why judicial review of veterans’ benefits could be altered to allow the CAVC to apply a clearly erroneous standard of review to a hypothetical factual finding based on the state of the factual record before the Board.

¹⁰³ See, e.g., *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 545 (2008) (“To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game.”) (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)). In fact, that was the position of Ms. Byron before the Federal Circuit. *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012). However, this articulation of the principle is potentially broader than the futility doctrine that is applicable in the context of general administrative law.

¹⁰⁴ FED. R. CIV. P. 8(a)(2) (requiring “a claim for relief” by a party filing a pleading ensure that this pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief”).

¹⁰⁵ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that a “pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do’”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

¹⁰⁶ *Id.* at 679.

One could also object to this proposal as being nothing more than “judicial activism”—judges doing the work that Congress has not done. There is some truth to this criticism. As I mentioned above, the state of affairs in the veterans’ benefits system is a serious concern. Congress has not acted to draft reforming legislation. It may be that it has not done so because it likes the status quo. It could also be because of political paralysis. If it is the latter, the veterans bear the brunt of a dysfunctional political system. That suggests it is time for judicial action—action that would be entirely appropriate. If, on the other hand, it turns out to be the former, then if the courts act to change the status quo, Congress will act to re-set the system. The difference is that the veteran will not bear the result of the uncertainty about true congressional intent.

What I have described above is merely a sketch of an approach to the issue of endless remands. Moreover, it would not solve all the problems associated with the “hamster-wheel.” It would, however, be a good start.

Before leaving the issue of remands, let me briefly mention, however, a second point from *Byron*. As a general matter, the Federal Circuit determined that it will not hear an appeal of a “non-final” remand order of the CAVC unless the order satisfies a stringent three-part test.¹⁰⁷ Ms. Byron was able to satisfy that test.¹⁰⁸ Most litigants are not able to do so.¹⁰⁹ One way in which to reduce delays, at least in part, would be to loosen the standards by which the Federal Circuit reviews “non-final” remand orders.

¹⁰⁷ See *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002) (stating that all of the following must be shown in order for it to have jurisdiction over a non-final remand order: “(1) There must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand, *i.e.*, that the remand proceeding may moot the issue”) (footnotes omitted).

¹⁰⁸ *Byron*, 670 F.3d at 1205.

¹⁰⁹ See *e.g.*, *Donnellan v. Shinseki*, 676 F.3d 1089, 1091-93 (Fed. Cir. 2012) (discussing the three-part test from *Williams* and declining to review a non-final order of the CAVC).

The Federal Circuit clearly has the authority to review remand orders in a more comprehensive manner.¹¹⁰ As the Federal Circuit noted, Congress has not specifically mandated that its review be premised on the finality of a CAVC decision.¹¹¹ In addition, the rationales the Federal Circuit used to support its decision to limit review are not compelling in the context of the veterans' benefits system. The Federal Circuit supported its position with the following three arguments: “‘it promot[es] efficient judicial administration,’ ‘emphasize[s] the deference that appellate courts owe to the trial judge,’ and ‘reduces harassment of opponents and the clogging of courts through successive appeals.’”¹¹² In the context of the veterans' benefits system, there is no need to defer to a “trial judge” since the CAVC is an appellate tribunal. As to the other two rationales, while judicial efficiency is a laudable goal, and no one would want harassment as a component of civil litigation, the seemingly endless delays in this system, in my view, outweigh these concepts. In any event, I feel *Byron* highlights an opportunity for the Federal Circuit to make a decision to streamline the appellate process.

C. The Role of the Federal Circuit

The Federal Circuit has a unique place in the law of veterans' benefits. As I previously discussed, that court's place is not only unique but also one that is subject to reconsideration.¹¹³ I will not

¹¹⁰ 38 U.S.C. § 7292 (2006).

¹¹¹ See, e.g., *Ebel v. Shinseki*, 673 F.3d 1337, 1340 (Fed. Cir. 2012) (“Unlike statutes governing cases appealed from other tribunals, this provision does not explicitly premise appellate review on the finality of the Veterans Court’s decision.”).

¹¹² *Id.* (citations omitted).

¹¹³ See, e.g., Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 380-81 (2009) [hereinafter *Legislative Commission*] (discussing the unique relationship between the CAVC and the Federal Circuit); Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH J.L. REFORM 483, 523-26 (2007) [hereinafter *Significant Developments*] (noting, among other things, the Federal Circuit’s limited authority to review judgments of the CAVC).

here repeat my earlier discussions concerning the Federal Circuit's role in the process. However, there is one point drawn from the collective consideration of *Byron*, *Chandler*, and *Guerra* that is worth highlighting about the Federal Circuit.

Veterans' advocates often tell me that they oppose removing the Federal Circuit from the appellate process because they want an extra layer of review of what can be perceived as an "anti-veteran" CAVC. As I have responded, doing an empirical study on that point would be a difficult endeavor, if for no other reason than it is not always an easy task to decide whether a decision is "pro-veteran" or "anti-veteran." However, even if we simply take the approach of "who wins," in our very small sample size, the Veteran lost in two of the three cases at the CAVC.¹¹⁴ Importantly, for present purposes, the Veteran lost in all three appeals at the Federal Circuit. Due to the small sample size, this statistic means nothing globally. It might suggest that having an additional layer of review really is neither "pro-" nor "anti-" veteran as a general matter. Thus, if that is the principal reason for keeping the Federal Circuit in the mix, we should seriously reconsider the role of that court in the process.

The decision to remove the Federal Circuit from the process is a complicated one because it would also require attention to the status and role of the CAVC. For example, should the CAVC be converted to an Article III tribunal? Would a lack of Federal Circuit review necessitate changes internal to the CAVC such as greater use of panel decisions? Should there be some role for other Article III adjudicators such as the district courts? All of these questions make clear that it is not a simple thing to adopt such a significant change in the architecture of judicial review that has been in place for nearly a quarter of a century. My point here, however, is merely that we may not want to avoid having that

¹¹⁴ See *supra* notes 7-29, 66-81 and accompanying text (noting that the Veteran lost in *Guerra* and *Byron*) and notes 30-65 and accompanying text (noting that the Veteran prevailed in *Chandler*).

discussion if the only reason for doing so is based on a belief that the Federal Circuit is systemically more favorable to veterans in its decisions than the CAVC.

D. CAVC Single-Judge Adjudication

Of the three appeals considered in this Essay, all three ended up with Federal Circuit opinions rendered by a three-judge panel and reported in the Federal Reporter. In other words, all three Federal Circuit decisions are precedential, establishing the law in the context of veterans' benefits. This is, of course, a good thing if one believes – as I do – that the development of the law in this area is something to be desired.

This section of the Essay is not related to the Federal Circuit but rather to the role of the CAVC. In two of the three appeals subject to our discussion, the CAVC decided the case by a single-judge memorandum decision.¹¹⁵ That fact means that in two-thirds of the sample at hand, the CAVC determined that the matter at issue did not require a decision that would have precedential effect.¹¹⁶ I have been critical in the past of the

¹¹⁵ *Byron v. Shinseki*, No. 09-4634, 2011 WL 244168, at *1 (Vet. App. June 20, 2011); *Guerra v. Shinseki*, No. 08-0223, 2010 WL 1140882, at *1 (Vet. App. Mar. 26, 2010).

¹¹⁶ *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990). The *Frankel* criteria are as follows:

If, after due consideration, the Court determines that the case on appeal is of relative simplicity and 1. does not establish a new rule of law; 2. does not alter, modify, criticize, or clarify an existing rule of law; 3. does not apply an established rule of law to a novel fact situation; 4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide; 5. does not involve a legal issue of continuing public interest; and 6. the outcome is not reasonably debatable, the decision of the BVA may be affirmed or reversed on motion for summary disposition by either party, or on the Court's own initiative, by an order and judgment without opinion. By statute, this Court may sit by single judge, in panels of three or en banc, 38 U.S.C.A. §§ 4054(b), 4067(d)(2). Single judges will consider and decide cases identified for summary consideration and decision.

Id.

CAVC's use of single-judge adjudication.¹¹⁷ The point here is that if all of the cases that are the subject of this Essay were deemed sufficiently important that the Federal Circuit issued precedential opinions, perhaps the CAVC should reexamine how the *Frankel* criteria are being applied in practice. If those criteria are being applied faithfully, then it may be worth considering whether they should be changed to better comport with the approach of the Federal Circuit in issuing precedential opinions. On the other hand, if the *Frankel* criteria as they appear on paper are not reflective of how they are being applied in practice, the CAVC may wish to bring the law on the books into conformity with the law in reality.

E. *Brown v. Gardner*, Alone and with *Chevron*

Guerra and *Chandler* illustrate the final point I will highlight. It concerns what the pro-veteran interpretative canon of statutory construction from *Brown v. Gardner* really means, both standing alone, and in the context of the *Chevron* doctrine at the heart of much administrative law.¹¹⁸ As previously discussed, in *Chandler*, the Federal Circuit and the CAVC considered a veterans' benefit statute for which there was no implementing regulation.¹¹⁹ So in *Chandler*, the *Chevron* doctrine has no application. In contrast, in *Guerra*, there was a regulation purporting to implement

¹¹⁷ See, e.g., *Significant Developments*, *supra* note 113, at 515-21. For additional commentary largely critical of the use of single-judge adjudication, see Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535 (2004); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL'Y 279 (2004).

¹¹⁸ Under the *Brown v. Gardner* canon of statutory construction the Supreme Court has stated that "interpretative doubt is to be resolved in the veteran's favor." 513 U.S. 115, 118 (1994). In shorthand terms, under the *Chevron* doctrine, a court will uphold an agency's interpretation of an ambiguous statute so long as that interpretation is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that a court will uphold an agency's interpretation of an ambiguous statute so long as that interpretation is reasonable); see also Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretative Doubt be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59 (2011) (discussing the interplay between these two doctrines).

¹¹⁹ *Chandler v. Shinseki*, 676 F.3d 1045 (Fed. Cir. 2012).

the statutory provision at issue.¹²⁰ Thus, both the *Brown v. Gardner* statutory presumption and the *Chevron* doctrine of deference to reasonable agency interpretations were ripe for consideration.

First, in *Chandler*, there was no administrative guidance with respect to the corresponding statutory provision. This situation raises the fundamental question of what is meant by the *Brown v. Gardner* directive that “interpretative doubt is to be resolved in the veteran’s favor.” However, it is problematic to articulate what the directive could mean in practice. It seems inconceivable that the directive means that the Veteran will always win whenever there is any question about the meaning of a statutory provision (again not the subject of an administrative regulation). The simple fact of the matter is that language is too indefinite to exclude any ambiguity in the majority of cases. But, if that is so, what could the canon mean, since we have to assume the Supreme Court meant it to have at least some real force?

Chandler points this conflict out in rather stark terms because there was a complex web of statutory provisions at play.¹²¹ When combining the opinions of the CAVC and the Federal Circuit, there were five judges who believed that the statutory terms favored the Veteran’s position,¹²² and five judges who believed they favored the Secretary’s interpretation.¹²³ It is difficult to accept that there was not some ambiguity in the complex and interconnected statutory text at issue in *Chandler*. But if that were indeed the case, it would seem likely that the *Brown v. Gardner* canon of construction would have led to a finding in favor of

¹²⁰ *Guerra v. Shinseki*, 642 F.3d 1046, 1049-50 (Fed. Cir. 2011) (discussing *Chevron* and VA’s regulation corresponding to the statute in question).

¹²¹ *See Chandler v. Shinseki*, 24 Vet. App. 23, 24-25 (2010) (discussing the intertwined statutes at issue, sections 1521 and 1513 of title 38, U.S. Code).

¹²² *Id.* at 23, 31 (noting that seven CAVC judges participated in this case and that Chief Judge Kasold filed a dissenting opinion in which Judge Greene joined).

¹²³ *See Chandler*, 676 F.3d at 1046 (noting that the opinion was joined by two circuit judges and a district judge sitting by designation concurred in the result).

the veteran.¹²⁴ After all, this is not a situation in which we are dealing with a close call concerning ambiguity, at least not based on the assessment of ten judges who split down the middle on the meaning of the legislation at issue.

How was it that the veteran did not prevail? It seems to me that the judges who took the position that the Secretary was correct did not pay sufficient attention to the ambiguity in the statutes at play. I am not saying that their interpretation of the statutes was not correct. In fact, if I had been sitting as a judge in a world not constrained by the *Brown v. Gardner* canon of construction, I would have joined the dissent in the CAVC and the opinion of the Federal Circuit panel. The reality is that the world in which *Chandler* was decided was one in which *Brown v. Gardner* did exist.¹²⁵ In other words, unless the statutory provisions at issue in *Chandler* were not ambiguous, the veteran should have prevailed, if the *Brown v. Gardner* canon of construction has any meaning. It seems to me inconceivable that those provisions were free of “interpretative doubt.”¹²⁶ The Supreme Court has told us that “interpretative doubt” is resolved in the veteran’s favor.¹²⁷

What *Chandler* reflects, I think, is an essential unwillingness to accept the true implications of what the Supreme Court said in *Brown v. Gardner*. At a minimum, when there is no regulatory guidance, a court should not engage in the same type of statutory construction it would do outside the context of veterans’ law. Instead, the CAVC and/or the Federal Circuit should adopt a view that says once an ambiguity is found, the veteran’s interpretation, if plausible, is the one that will prevail. The implications of *Brown v. Gardner* should not

¹²⁴ See *Chandler*, 24 Vet. App. at 31-33 (Davis, J., concurring) (describing the main thrust of Judge Davis’s position in the case).

¹²⁵ *Brown v. Gardner*, 513 U.S. 115 (1994); *Chandler*, 24 Vet. App. at 23 (noting it was decided in 2010).

¹²⁶ *Brown*, 513 U.S. at 118.

¹²⁷ *Id.*

be avoided by refusing to acknowledge true ambiguity when it exists, which I fear is fundamentally what happened in *Chandler*. Perhaps this is an instance in which the Supreme Court will need to revisit the question to decide whether it will retreat from its position in *Brown v. Gardner* or stress to the CAVC and the Federal Circuit that the canon of construction has true meaning and should be given its full effect.

Matters may very well be different – and are certainly more complicated – when dealing with the situation in *Guerra*, in which regulatory guidance subject to *Chevron* deference exists. The difficulty is that the *Brown v. Gardner* canon, as I have interpreted it above, leads to a different conclusion than the *Chevron* doctrine. If a statute is ambiguous and Congress has provided that an agency shall have the authority to issue regulations interpreting it, *Chevron* instructs that a court’s role is to defer to the regulation as long as it is a “permissible” construction of the statutory text (or a gap in that text).¹²⁸ But, of course, if the statute is ambiguous in the veterans’ law context, under *Brown v. Gardner* that doubt should be resolved in favor of the veteran.¹²⁹ This tension explains the split in views on the Federal Circuit in *Guerra*.¹³⁰

As Professor Linda Jellum has written, fundamentally these two doctrines cannot co-exist.¹³¹ Both doctrines flow from Supreme Court precedent, so until it makes a change, the CAVC and the Federal Circuit must attempt to reconcile them. As *Guerra* reflects, however, most often the courts simply choose to apply one or the other doctrine with little or no effort at reconciliation.¹³² While both courts might reach the “correct” result resolving the

¹²⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

¹²⁹ *Brown*, 513 U.S. at 118.

¹³⁰ Compare *Guerra v. Shinseki*, 642 F.3d 1046, 1049-52 (Fed. Cir. 2011) (applying *Chevron* and rejecting application of *Brown v. Gardner*), with *Guerra*, 642 F.3d at 1054-55 (Gajarsa, J., dissenting) (applying *Brown v. Gardner* and rejecting application of *Chevron*).
¹³¹ See Jellum, *supra* note 118, at 121-22 (noting that the *Gardner* presumption and the *Chevron* doctrine “simply cannot coexist harmoniously as currently formulated”).

¹³² *Guerra*, 642 F.3d at 1049 (giving VA deference under *Chevron*).

issue, the lack of conscious discussion of the question masks the true difficulty created by the existence of *Brown v. Gardner* on the one hand and *Chevron* on the other.

I believe that Professor Jellum provided one insight in particular that can assist courts in giving life to both *Brown v. Gardner* and *Chevron* when she suggested that perhaps we should “view the direction that ‘interpretive doubt is to be resolved in the veteran’s favor’ as a duty belonging to the VA and not as an interpretative tool belonging to the courts.”¹³³ Such devolution of the *Brown v. Gardner* presumption to the administrative level when a relevant regulation exists is a promising means to reduce the tension between the Supreme Court’s competing instructions. As I view this approach – and here I am not necessarily representing a view held by Professor Jellum – a court would assess the reasonableness of a VA regulation under *Chevron* by considering whether the VA’s views were reasonable in the context of an administrative duty to resolve doubt in a veteran’s favor. Thus, a regulation that might be “permissible” under a standard *Chevron* analysis, could, in theory, not be permissible given the VA’s need to take the *Brown v. Gardner* presumption into account.

In light of this, much more development needs to occur in order to sufficiently identify the boundaries of this analysis. Yet, taking this approach would be a welcome step in reconciling the tension between *Brown v. Gardner* and *Chevron* that is all too apparent in cases such as *Guerra*. At a minimum, it seems that the Federal Circuit and the CAVC should devote more attention to resolving what is a truly perplexing legal conundrum.

¹³³ Jellum, *supra* note 118, at 120 (footnote omitted).

CONCLUSION

Byron, Chandler and *Guerra* are only three appeals drawn from a sea of hundreds of cases decided by the CAVC and the Federal Circuit over the past several years. Yet, as described above,¹³⁴ these cases both individually and collectively, raise several significant issues implicated in the current system by which veterans' benefits are awarded and reviewed. These issues range from the role of judicial bodies in the process, to systemic delays in the receipt of benefits, to legal doctrines going to the core of administrative law and statutory interpretation. I have no doubt that if we selected three other cases in the relevant time period we would have been able to identify equally weighty matters.

I suggested means by which the courts involved in this process can begin to address the serious matters implicated in several of the issues discussed above. I have faith that both the CAVC and the Federal Circuit have and will continue to address these matters. The reality remains, however, that many of the matters I have identified scream for a legislative solution. In the end, the system cannot be fundamentally improved until Congress fulfills its critical role in the process.¹³⁵ Only time will tell if that is to happen; I hope it does. Perhaps the twenty-fifth anniversary of the VJRA will provide the impetus for all to continue to pay heed to President Lincoln's exhortation.¹³⁶

¹³⁴ See *supra* Part II.

¹³⁵ See *Legislative Commission*, *supra* note 113, at 388-90 (calling on Congress to create a legislative commission to assess the entire veterans' benefits process from start to finish, including judicial review); see also Michael P. Allen, *The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 59-66 (2011) (discussing future challenges in the veterans' benefits system). While there has been discussion about such a commission, Congress has not yet acted.

¹³⁶ See Lincoln, *supra* note 5.