

# The Veteran's Canon Under Fire

We have long applied 'the canon that provision for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'

*Henderson v Shinseki*<sup>1</sup>



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**A**s Veterans Day approaches, stores and restaurants will offer discounts and free meals to veterans. Children will write thank you letters, and citizens nationwide will raise flags to honor and thank veterans. We can never repay those who lost their life, health, or livelihood in defense of the nation. Since the American Revolution, and in gratitude for that incalculable debt, the US government, on behalf of the American public, has seen fit to grant a host of benefits and services to those who wore the uniform.<sup>2,3</sup> Among the best known are health care, burial services, compensation and pensions, home loans, and the GI Bill.

Less recognized yet arguably essential for the fair and consistent provision of these entitlements is a legal principle: the veteran's canon. A canon is a system of rules or maxims used to interpret legal instruments, such as statutes. They are not rules but serve as a "principle that guides the interpretation of the text."<sup>4</sup> Since I am not a lawyer, I will undoubtedly oversimplify this legal principle, but I hope to get enough right to explain why the veteran's canon should matter to federal health care professionals.

At its core, the veteran's canon means that when the US Department of Veterans Affairs (VA) and a veteran have a legal dispute about VA benefits, the courts will give deference to the veteran. Underscoring that any ambiguity in the statute is resolved in the veteran's favor, the canon is known in legal circles as the Gardner deference. This is a reference to a 1994 case in which a Korean War veteran underwent surgery in a VA facility for a herniated disc he alleged caused pain and weakness in his left lower extremity.<sup>5</sup> Gardner argued that federal statutes 38 USC § 1151 underlying corresponding VA regulation 38 CFR § 3.358(c)(3) granted disability benefits to veterans injured during VA treatment. The VA denied the disability claim, contending

the regulation restricted compensation to veterans whose injury was the fault of the VA; thus, the disability had to have been the result of negligent treatment or an unforeseen therapeutic accident.<sup>5</sup>

The case wound its way through various appeals boards and courts until the Supreme Court of the United States (SCOTUS) ruled that the statute's context left no ambiguity, and that any care provided under VA auspices was covered under the statute. What is important for this column is that the justices opined that had ambiguity been present, it would have legally necessitated, "applying the rule that interpretive doubt is to be resolved in the veteran's favor."<sup>5</sup> In Gardner's case, the courts reaffirmed nearly 80 years of judicial precedent upholding the veteran's canon.

Thirty years later, *Rudisill v McDonough* again questioned the veteran's canon.<sup>6</sup> Educational benefits, namely the GI Bill, were the issue in this case. Rudisill served during 3 different periods in the US Army, totaling 8 years. Two educational programs overlapped during Rudisill's tenure in the military: the Montgomery GI Bill and Post-9/11 Veterans Educational Assistance Act. Rudisill had used a portion of his Montgomery benefits to fund his undergraduate education and now wished to use the more extensive Post-9/11 assistance to finance his graduate degree. Rudisill and the VA disagreed about when his combined benefits would be capped, either at 36 or 48 months. After working its way through appeals courts, SCOTUS was again called upon for judgment.

The justices found that Rudisill qualified under both programs and could use them in any order he wished up to the cap. The majority found no ambiguity in the statute; however, if interpretation was required, the majority of justices indicated that the veteran's canon would have supported Rudisill. While this sounds like good news for veterans, 2 justices authored a dissenting opinion that questioned

the constitutional grounding of the veteran's canon, noting that the "canon appears to have developed almost by accident."<sup>6</sup> The minority opinion suggested that when the veteran's canon allocates resources to pay for specific veteran benefits, other interests and groups are deprived of those same resources, resulting in potential inequity.<sup>7</sup>

The potential ethical import and clinical impact of striking down the veteran's canon is serious. It is especially concerning given that in a recent case, the SCOTUS ruling struck down another legal interpretation that also benefited the VA and ultimately veterans: the *Chevron* deference.<sup>8</sup> This precedent held that when a legal dispute arises about the meaning of a specific federal agency regulation or policy, the courts should defer to the federal agency's presumably superior understanding of the matter. The principle places the locus of decision-making with the subject-matter experts of the respective agency rather than the courts.

Ironically, given the legislative purposes of both interpretive principles, their overturning would likely introduce much more uncertainty, variation, and unpredictability in cases involving veteran benefits. This is bad news for both veterans and the VA. Veterans might not prevail as often in court when they have a reasonable claim, leading to more aggressive challenges. In response, the VA would have a heavier and more costly burden of administrative proof to defend sound decisions.<sup>9</sup> Recently, the VA has tried to reduce the backlog of claims. The inability to have legal recourse to *Chevron* or *Gardener* could result in even more delay in adjudicating veterans' claims that enable them to access benefits and services, already an object of congressional pressure.<sup>10</sup>

Courts will continue to debate the issue with another judicial test of the canon on the current SCOTUS docket (*Bufkin v McDonough*).<sup>11</sup> The veteran's canon was put in place to equalize the power differential between the VA and the veteran: in administrative language, to make it more likely than not that the veteran would prevail when regulations were ambiguous. There are many legal and political rationales

for veteran's canon, including enabling veterans to file claims for service-connected illnesses. The veteran's canon helped Vietnam War-era veterans receive VA care while researchers were still studying the sequela of Agent Orange exposure.<sup>12</sup> The legislative purpose of the veteran's canon is the same as that of all VA benefits and services commemorated on Veterans Day. As expressed by SCOTUS justices in the wake of World War II, the benefit statutes should be "liberally construed for the benefit of those who left private life to serve their country in its hour of greatest need."<sup>13</sup>

### Disclaimer

The opinions expressed herein are those of the author and do not necessarily reflect those of *Federal Practitioner*, Frontline Medical Communications Inc., the US Government, or any of its agencies.

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