Appeal No. 20-1637

In the United States Court of Appeals for the Federal Circuit

JAMES R. RUDISILL,
Claimant-Appellee,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellant.

On Appeal from the United States Court of Appeals for Veterans Claims No. 16-4134, Judges Schoelen, Bartley, and Allen

REPLY BRIEF OF RESPONDENT-APPELLANT ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

ARGUMENT

I. The Court Has Jurisdiction Over This Appeal

This Court's jurisdiction over appeals from the Veterans Court is governed by 38 U.S.C. §7292, which permits review of the "validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation … or any interpretation thereof" and requires the "filing [of] a notice of appeal … within" 60 days of the judgment. Mr. Rudisill does not dispute that both of these elements are met here. The appeal is about statutory interpretation and he admits that "[t]he Secretary timely filed [his] notice." Resp. Br., ECF 24, at 28.

Mr. Rudisill similarly does not dispute that undersigned counsel is authorized to represent the Secretary before this Court, nor that the Solicitor General has authorized this appeal. Rather, he argues that the *timing* of the Solicitor General's decision that the appeal should proceed deprives this Court of jurisdiction, notwithstanding the fact that all of the statutory requirements have been met. Resp. Br. 31. Mr. Rudisill's argument is contrary to both the express delegation of authority for representing the Government and standing practice.

As with his argument on the merits, Mr. Rudisill attempts to minimize or dismiss the authorities that directly address the question that he is posing and provide an answer contrary to his preferred outcome. In *Hogg v. United States*, the appellee moved to dismiss the appeal arguing that "the Government's timely notice

of appeal … is fatally defective because it was filed by the United States Attorney at a time when the Solicitor General had not authorized the appeal." 428 F.2d 274, 277 (6th Cir. 1970). The court rejected that argument, holding that the "Attorney General has plenary power over the conduct of litigation to which the United States is a party" and "the jurisdiction of the Solicitor General" does not "foreclose[] the Attorney General from directing that a notice of appeal be filed." *Id*. at 278. Neither the authority of the Attorney General, nor the role of the Solicitor General, has changed since *Hogg* was decided.

Unsurprisingly, and contrary to Mr. Rudisill's suggestion, Resp. Br. 30-31, *Hogg* continues to be good law. Indeed, it was applied as recently as last year. *See United States v. Marifat*, 2019 U.S. Dist. Lexis 65153, at *3 (E.D. Cal. Apr. 16, 2019) ("Further, the regulation requiring the Solicitor General to authorize an appeal does not require such authorization before [the] government files its notice of appeal.") (citing *Hogg*, 428 F.2d at 280); *see also United States v. Hill*, 19 F.3d 984, 991 n.6 (5th Cir. 1994) (agreeing that the reasoning in *Hogg* is applicable to the current version of 28 C.F.R. §0.20(b)).

And given the extensive and time-consuming process the Government follows in order to pursue affirmative appeals, *see* ECF 19 at 2, it is not uncommon for so-called "protective" notices of appeal to be filed, pending a final decision from the Solicitor General. Not only is the practice followed in this case,

therefore, routine and consistent with the Solicitor General's role in authorizing appeals, it is also expressly contemplated by the regulations governing the Department of Justice:[1]

> Until the Solicitor General has made a decision whether an appeal will be taken, the Government attorney handling the case *must* take all necessary procedural actions to preserve the Government's right to take an appeal, *including filing a protective notice of appeal when the time to file a notice of appeal is about to expire and the Solicitor General has not yet made a decision*.

DOJ Directive 1-15, §6, available at 28 C.F.R. Pt. 0, Subpt. Y, App. (emphasis added). In other words, undersigned counsel was not only authorized to file the notice of appeal in this case, she was obligated to do so.

Mr. Rudisill's invocation of *Fed. Elec. Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) is, therefore, unavailing. The key factor in the Court's reasoning there—that the FEC did not have authority to represent itself at the Supreme Court, and therefore the question was whether an *unauthorized* act could be subsequently ratified, *id*. at 91, 98—does not apply in this case.[2] There is no question that the Attorney General has plenary authority to conduct and supervise

[1] Mr. Rudisill's attempt to distinguish the policy applicable to U.S. Attorneys, Resp. Br. 30, is beside the point as none are involved in this case.

[2] Similarly, the issue in *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), cited by the amici, Am. Br., ECF 26, at 19, was that the Solicitor General had actually *denied* the authorization sought by the special prosecutor. *Id*. at 698.

litigation on behalf of the United States, including representing the Secretary in this Court. *See* 28 U.S.C. §§516, 518, 519. That authority is further delegated to the various litigating sections of the Department of Justice, including specifically the authority to file "protective" notices of appeal pending a final decision from the Solicitor General. DOJ Directive 1-15, §6.

Ultimately, we are not aware of any case where a timely "protective" notice of appeal filed by the Department of Justice and followed by a decision from the Solicitor General approving the appeal was insufficient to confer jurisdiction. Certainly, neither Mr. Rudisill nor his amici has cited any.

II. Congress Imposed Clear And Unambiguous Limits On Entitlement to Post-9/11 Benefits For Veterans With Unused MGIB Benefits

A. Sections 3322(d) and 3327 Unambiguously Apply To Mr. Rudisill And Limit His Entitlement To Post-9/11 Benefits

Mr. Rudisill agrees that "[a]s to the merits of this case, the fundamental question is to whom do 38 U.S.C. §§3322(d) and 3327 apply." Resp. Br. 31. Nevertheless, like the Veterans Court majority, he devotes precious little analysis to what those sections actually say—although, notably, amidst that analysis, Mr. Rudisill does not dispute that he meets the plain language criteria set forth in either section.

Specifically, Mr. Rudisill does not dispute that "as of August 1, 2009," he was "entitled to basic educational assistance under [MGIB] and ha[d] used, but

retain[ed] unused, entitlement under that chapter." 38 U.S.C. §3327(a)(1)(A); Appx57-58. And he also does not dispute that "as of the date of [his] election" to use Post-9/11 benefits he met "the requirements for entitlement to educational assistance under [Post-9/11]." 38 U.S.C. §3327(a)(2); Appx57-58. Thus, Mr. Rudisill indisputably meets the threshold requirements actually set forth in §3327.

Similarly, there is no dispute that, at the time of his election to use Post-9/11 benefits, his option to do so was not foreclosed by the mandatory election and bar imposed by §3322(h)—both because he had a separate period of service he could credit to Post-9/11 and because his service pre-dates the effective date of §3322(h) anyway. Therefore, there is no dispute that he was "entitled to educational assistance under" both MGIB and Post-9/11 when he decided that he wanted to use his Post-9/11 entitlement instead of continuing to use MGIB benefits. 38 U.S.C. §3322(d); Appx58. That is, Mr. Rudisill also indisputably meets the threshold criteria set forth in §3322(d).

Not only does Mr. Rudisill not dispute that he meets all of the textual requirements of §3322(d) and §3327, he also does not dispute that the additional limitation imposed by the Veterans Court based on periods of service is nowhere to be found in the actual language of these sections, on which "the proper reading of," he concedes, the "dispute ultimately hinges." Resp. Br. 6. Nowhere in his brief

does he identify any language in either §3327 or §3322(d) that excludes veterans with multiple periods of service from their reach.[3]

And his suggestion that *other* provisions somehow limit the application of these sections, *e.g.* Resp. Br. 33, is immediately belied by the fact that none of these other provisions make any mention of §3322(d) or §3327 and they address separate and distinct aspects of the administration of education benefits.[4] Moreover, as discussed in Section II.B, below, the remainder of the statutory scheme is perfectly consistent with applying §3322(d) and §3327 to all veterans who meet their textual terms, including Mr. Rudisill.

Finally, Mr. Rudisill does not dispute that §3327(d)(2)(A) unambiguously limits "the number of months of entitlement" to Post-9/11 benefits for individuals who have "used, but retain[] unused" MGIB benefits when they elect to use Post-9/11 benefits, to "the number of months of unused entitlement of the

[3] Mr. Rudisill's argument that silence in the legislative history on a distinction Congress was not making somehow means that distinction should now be made cannot help but ring hollow. *See* Resp. Br. 49. This Court need not search "in vain" or otherwise for legislative history indicating that "separately qualifying [] service [was] irrelevant under" §3327—it need look no further than the language in §3327 itself.

[4] The fact that each of these sections discusses a different set of programs lends further support to the fact that they are aimed at different aspects of the overall scheme of education benefits, but are not intended to dictate each other's applicability. *Compare* §3322(a), §3322(d), §3322(h), §3327, and §3695; *see also* Open. Br., ECF 23, at 6-7 n.3 & 4.

individual under" MGIB. Indeed, he agrees that it is "clear" that, at minimum, §3327 "limit[s] the amount of Post-9/11 benefits to the amount of converted [MGIB] benefits." Resp. Br. 47.

On the remainder of things Mr. Rudisill proclaims are "clear about §3327" he is only partially correct. First, he states that §3327 "allows transferred [MGIB] benefits to remain payable under that program," which he claims "suggests §3327's goal is not to ensure all months of [MGIB] benefits are exhausted or converted before obtaining Post-9/11 benefits." Resp. Br. 47. We agree that §3327(e) permits the continued payment of MGIB benefits if the "educational assistance" "is not authorized to be available" under Post-9/11. When the Post-9/11 program was initially created, it included fewer non-traditional college or vocational options as qualifying programs than the MGIB program covered and §3327(e) allowed a veteran who elected to use Post-9/11 benefits but enrolled in a vocational program to still receive benefits under MGIB.

In other words, this provision is about the scope of educational opportunities available and is meant to ensure that veterans do not lose the ability to pursue a course available under MGIB, but not Post-9/11, as part of their full 36 months of educational benefits. But it neither says nor implies anything about the conditions under which veterans could obtain *more* than 36 months of benefits by *combining* MGIB and Post-9/11 (as Mr. Rudisill is trying to do).

Second, Mr. Rudisill states that §3327 "speaks in permissive rather than mandatory terms," which he claims "mean[s] it is not the exclusive way of obtaining Post-9/11 benefits." Resp. Br. 47. Again, Mr. Rudisill's factual statement is partially correct, but the inference he attempts to draw in terms of the issue before this Court is unwarranted. We agree that §3327 "speaks in permissive … terms" when it comes to Mr. Rudisill's choice as to whether and when to begin using Post-9/11 benefits. "An individual *may* elect to receive educational assistance under this chapter …" 38 U.S.C. §3327(a) (emphasis added).[5]

But when it comes to the *consequences* of making this voluntary election, the statute is anything but permissive. To the contrary, §3327(d), unlike §3327(a), uses the widely-recognized-as-being-mandatory "shall." "[A]n individual making an election … *shall* be entitled to educational assistance under [Post-9/11], *instead of* basic educational assistance under [MGIB]." 38 U.S.C. §3327(d)(1) (emphasis added). And specifically for veterans who have unused MGIB benefits remaining (*i.e.*, the circumstances under which Mr. Rudisill sought to obtain Post-9/11 benefits), §3327(d)(2)(A) states: "the number of months of entitlement of the individual to educational assistance under [Post-9/11] *shall be* the number of

[5] The argument made by the amici that veterans "should not be required to use the less generous [MGIB] when they have met the service requirement and earned benefits under [Post-9/11]", Am. Br. 17-18, is therefore beside the point. All the parties agree that no such requirement exists.

months … of unused entitlement of the individual under [MGIB]." (emphasis added). *See Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) ("When, as is the case here, Congress distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty.") (internal citation and quotation omitted).

Thus, the "permissive" nature of §3327 means that Mr. Rudisill was free to keep using his MGIB benefits, not that he was free to take advantage of the portions of §3327 he liked, but to ignore the consequences that he did not. In other words, the "choice" afforded to Mr. Rudisill by §3327—continue using his MGIB benefits and then obtain 12 additional months of Post-9/11 benefits or switch to Post-9/11 benefits right away, but be limited to the unused portion of the MGIB entitlement—was Congress's, not "Hobson's". *Cf.* Resp. Br. 5; *see also* Appx32.

B. Applying §3322(d) and §3327 To All Veterans Is Consistent With The Overall Statutory Scheme

Rather than grappling with the language of §3322(d) and §3327 themselves, Mr. Rudisill argues that other provisions somehow limit the scope of §3322(d), which in turn limits the scope of §3327. Mr. Rudisill is wrong on both counts. First, §3322(d) does not restrict the application of §3327. To avoid the consequences of §3327, Mr. Rudisill would have to show that *§3327* excludes veterans with multiple periods of service (it does not), but it would not be enough for him to show that §3322(d) excludes them (which, it also, does not). Proving

the latter would only mean that §3322(d) identifies some, but not all, of the veterans who are subject to §3327.

Second, none of the statutory provisions Mr. Rudisill identifies excludes veterans with multiple periods of service from the scope of §3322(d) (much less §3327). Again, it is not enough for Mr. Rudisill to show that it is possible to harmonize other statutory provisions with reading §3322(d) and §3327 as limited to veterans with a single period of service (already a tall order for some of them). For his argument to be meaningful he would have to show the inverse: that §3322(d) and §3327 *cannot* be harmonized with the other statutory provisions if they are read consistent with their plain terms to apply to all veterans. Mr. Rudisill, and Veterans Court, have not and cannot make such a showing.

1. Section 3322(h) Does Not Limit The Application Of §3322(d) Or §3327

Mr. Rudisill begins his analysis with §3322(h) and an accusation of some type of misinterpretation apparently grounded in the distinction between "period[s] of 'qualifying service'" and "individuals with no more than a single period of qualifying service." Resp. Br. 36.[6] But Mr. Rudisill never explains how his

[6] Mr. Rudisill appears to misread the portion of our brief that he quotes. He characterizes our position as "§3322(h)(1) *applies only* to 'a veteran with a single period of service.'" Resp. Br. 35 (emphasis added and removed). What we actually said was that a "veteran with a single period of service" must elect "under which authority such service is to be credited." *See* Open. Br. 36. That is, we agree that upon going into effect, §3322(h) applied to all veterans. However, it

distinction leads to a construction of §3322(d) and §3327, which indisputably make no mention of periods of service, as being limited on that basis.

In the end, the parties appear to agree that the purpose and effect of §3322(h) is to distinguish between veterans with a single period of qualifying service—who as a result of the mandatory election and bar would only be entitled to one program of benefits—and veterans with multiple periods of qualifying service—who may assign different periods of service to different programs and be entitled to benefits from more than one program.

And there is no dispute that Mr. Rudisill is not barred by §3322(h) from using both MGIB and Post-9/11 benefits. *See* Resp. Br. 35; Appx57. Indeed, if that was not the case—and Mr. Rudisill was barred by the mandatory election of §3322(h)—then there would be no need to address §3322(d) or §3327 at all, as Mr. Rudisill would not be entitled to Post-9/11 benefits in any amount. There is, therefore, no issue of to whom §3322(h) applies that is before this Court.

Instead, the relevance of §3322(h) to this case is two-fold. One, the explicit reference to "a [] single period of service" therein highlights the contrasting silence

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explicitly distinguishes between veterans based on the number of periods of service, and it bars veterans with a single period of service from receiving benefits under multiple programs. As relevant here, it demonstrates that Congress was aware of the fact that veterans could have a single or multiple separately qualifying periods of service and knew how to distinguish on that basis, but pointedly did not do so in §3322(d) or §3327.

in §3322(d) and §3327 on the subject. *See* Open. Br. Section II.B. Mr. Rudisill offers no response on this point. Two, it further demonstrates the error of the Veterans Court in construing §3322(d) and §3327 as applying only to veterans with a single period of service—unless those sections apply to all veterans with dual MGIB and Post-9/11 entitlement, §3322(h) renders them practically superfluous. *See id*.

On this second point, Mr. Rudisill does not even try to defend the Veterans Court's suggestion that §3322(d) and §3327 are given meaning by allowing veterans to change their mind while the application is pending. *See* Appx24-25; Open. Br. 38-39; Resp. Br. 45. Instead, Mr. Rudisill attempts to salvage his preferred interpretation by suggesting that §3322(d) and §3327 are intended to allow veterans with a single period of service to change their mind about what program they wanted to credit that service to after they made an election under §3322(h) and an award decision was made. Resp. Br. 45. "Obviously," he proclaims, "the overwhelming majority of ILO elections [what Mr. Rudisill calls §3327 elections] would (and do) occur at this stage, sometimes years after a POS election [what Mr. Rudisill calls §3322(h) elections], as was almost universally true in 2009." *Id*. Not only is there nothing obvious about Mr. Rudisill's claim, but it is wrong in every respect.

As a practical matter, §3322(h) did not come into effect until 2011, meaning veterans switching to Post-9/11 benefits before 2011 (which necessarily includes 2009) literally could not have been doing so "years after a [§3322(h)] election." And once §3322(h) went into effect, a veteran with a single period of service, upon making an election thereunder, would no longer meet the criteria for §3327. For example, if the veteran chose to credit the period of service to MGIB and began using those benefits, he or she would no longer have service that would enable him or her to "meet[] the requirements for entitlement to educational assistance under" Post-9/11 as required by §3327(a)(2). *See also* VA Manual § 3.10(b).[7]

Moreover, the language in §3322(h) itself indicates that Congress did not intend this election to be so ephemeral. By its plain terms, §3322(h) imposes a "*bar to duplication of eligibility* based on a single event or period of service," wherein the veteran "*shall elect*"—not "shall elect, but remains free to change his or her mind"—"under which authority such service is to be credited."

At bottom, it makes no sense to read the voluntary election in §3327 as existing only to undermine the mandatory election imposed by §3322(h). *See also*

[7] Mr. Rudisill also argues that the Manual states that "ILO elections are only necessary when an individual must 'forfeit one benefit in order to qualify for' Post-9/11 benefits *because of a prior POS election*." Resp. Br. 14 (emphasis added). The Manual does not tie "ILO elections" to "POS elections" as Mr. Rudisill suggests. Rather, it makes clear that there are only two elements to an "ILO election": it is "required when a claimant is applying for [Post-9/11] benefits" and it "applies only to [MGIB benefits]." VA Manual § 3.10(a)(2).

Appx33. Certainly, nothing about §3322(h) *requires* §3322(d) and §3327 to be so limited. To the contrary, applying §§3322(d), 3322(h), and 3327 to all veterans gives easy effect to all of Congress's directives: if a veteran can maintain entitlement to both MGIB and Post-9/11 benefits notwithstanding §3322(h)'s bar, such as, for example, if he or she has multiple periods of service, then the coordination of that dual entitlement is controlled by §3322(d) and §3327.

2. Section 3322(a) Does Not Limit The Application Of §3322(d) Or §3327

Mr. Rudisill next turns to §3322(a), arguing that the "bar on concurrent receipt of benefits under multiple programs" is an "unambiguous indication" that §3322(d) and §3327 "apply only to prevent the duplication of benefits." Resp. Br. 38. Presumably, Mr. Rudisill believes that "prevent[s] the duplication of benefits" is synonymous with "does not apply to veterans with multiple periods of service," although it does not have to be.[8]

To be clear, we agree that the bar in §3322(a) does not prevent a veteran from using a different program on a pay-period by pay-period basis, *if* the veteran

[8] Using more than one program at the same time is a type of "duplication of benefits." Using the same period of service to establish eligibility for more than one program is a different type of "duplication of benefits." And using more than one program to exceed the default total of 36 months of entitlement is yet a third type of "duplication of benefits." As it happens, Congress addressed different facets of this related phenomenon in different sections, *i.e.* §3322(a), §3322(h), and §3327, respectively.

is otherwise entitled to receive those benefits. That is, §3322(a) leaves open whether the veteran is eligible to receive benefits from multiple programs; its purpose is to limit the payments that can be received in a given pay period. Conversely, §3327 deals with the question that §3322(a) skips over, *viz*. whether veterans can receive Post-9/11 benefits while retaining MGIB entitlement. While these provisions ultimately work in tandem, they address separate and distinct facets of the use of education benefits. As Mr. Rudisill concedes, "§3322(a) contemplates something different than §3322(d) and §3327" and "provides for a *different* form of election than §3327." Resp. Br. 39 (emphasis in original).

In other words, the reason §3322(a) appears to "permit[] individuals to alternate between the Post-9/11 program and others without making an ILO election," Resp. Br. 41, is because that is not the question §3322(a) addresses. Just like §3322(a) does not address, and therefore cannot answer, the question of how long entitlement to education benefits lasts. But all that means is §3322(a) cannot answer the questions that are at issue in this case; §3322(a) does not dictate the scope of §3327 where Congress actually set out to address these issues and provided clear and unambiguous answers.

Indeed, as we explained in our opening brief, the only directional relationship between §3322(a) and §3327 that can exist goes in the opposite direction. *See* Open. Br. 42. For veterans whose dual eligibility is specifically

between MGIB and Post-9/11, not only does §3327 resolve the implicit presumption on which §3322(a) is based, but it is also the more specific of the two sections. Thus, on top of everything else, using §3322(a) to control §3327 would run afoul of the "commonplace [rule] of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal citation and quotation omitted).

3. Section 3695 Does Not Limit The Application Of §3322(d) or §3327

Finally, Mr. Rudisill argues that the aggregate 48-month cap on *all* education benefits in §3695 is an "unambiguous indication" that an election under §3327 "cannot be required any time an individual is entitled to both [MGIB] and Post-9/11 benefits." Resp. Br. 41. At the outset, §3327 does not *require* a veteran to make an election; it only dictates the consequences *if* a veteran chooses to make an election. More fundamentally, §3695 cannot limit to whom §3327 applies.

There is no dispute that §3695 serves a purpose in the overall statutory scheme even if §3327 applies to all veterans. First, it limits those veterans who exhaust MGIB before using their Post-9/11 benefits to no more than 12 additional months of entitlement. Second, for veterans who elect to begin using their Post-9/11 benefits without exhausting MGIB, it limits the amount of entitlement that they can receive under one of the other programs §3695 encompasses beyond Post-9/11 and MGIB. And third, for all veterans, §3695 confirms that 48 months

of benefits is the exception, not the rule; Congress intended 36 months as the presumptive length of educational benefits. *See also* Section III, below.

Thus, Mr. Rudisill's argument that "[t]here is no clear indication that Congress wished to impose the harsh consequence of being unable to obtain benefits up to the 48-month cap, for multi-program beneficiaries with separately qualifying service who wish to obtain Post-9/11 benefits before exhausting their [MGIB] entitlement," Resp. Br. 43, at best, suffers from circular logic. Section 3327 states that for individuals, like Mr. Rudisill, who are electing Post-9/11 benefits when they "ha[ve] used, but retain[] unused, [MGIB] entitlement," "the number of months of entitlement … shall be the number of months … of unused [MGIB] entitlement." 38 U.S.C. §3327(a)(1)(A) & (d)(2)(A). It is difficult to imagine a "clear[er] indication" than that.

* * *

Ultimately, applying §3322(d) and §3327 to all veterans, consistent with their textual terms, fits neatly and easily within the rest of the statutory scheme. Sections 3322(a)-(c) and (e)-(h) answer some form of "can the veteran use more than one program of benefits." If the answer to that question is no—such as a veteran who only had one period of qualifying service that can only be credited under one program—then there is no need to "coordinat[e]" anything pursuant to §3322(d) or otherwise, and the inquiry stops. But if the answer is yes—if, for

example, the veteran has multiple periods of service that can be credited to support multiple programs and does not run afoul of the other enumerated bars—then "coordination" under §3322(d) is required and §3327 addresses the consequent questions like "for how long" and "in what order" if the programs in question are MGIB and Post-9/11. And §3695 functions the way it does for all programs—as a global backstop that sets a ceiling on the receipt of benefits under MGIB, Post-9/11, and a dozen others.

But under Mr. Rudisill's (and the Veterans Court's) reading, most of the veterans who would need to coordinate benefits between MGIB and Post-9/11 would not be subject to the provisions explicitly dedicated to that "coordination." Not only is Mr. Rudisill's (and the Veterans Court's) interpretation of §3322(d) and §3327 not mandated by the remainder of the statutory scheme, it would render these sections virtually superfluous. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014).

C. The Directives Of §3322(d) and §3327 Are Not "Hidden"

Mr. Rudisill argues that it would be inappropriate to apply the limitation on entitlement in §3327(d)(2)(A) to him because "Congress would not have hidden a novel, onerous bar on entitlement to benefits under multiple GI Bill programs in the word 'coordination' in §3322(d)." Resp. Br. 47. "Congress does not hide elephants in mouseholes," he repeatedly proclaims. *Id*. at 26, 47, 48 (internal

quotation and citation omitted). But his argument gets the statutory scheme exactly backwards.

The "limitation on [Mr. Rudisill's] entitlement" to Post-9/11 benefits as constrained by his unused MGIB benefits is found in §3327, not §3322(d). *See* 38 U.S.C. §3327(d)(2). And it could not have been more clear or out in the open there. (Incidentally, the "novel[ty]" of these provisions is unsurprising, since the Post-9/11 Act is the first time that Congress left two ongoing active duty programs to run in parallel. *See* Open. Br. 5-6; *cf*. Am. Br. 11-12.) The function of the word "coordination" in §3322(d), and that subsection more generally, is to shine a spotlight on §3327's directives. Ultimately, the express and unambiguous limitation of §3327(d)(2)(A) is an elephant-sized problem for Mr. Rudisill (and the Veterans Court majority), but it is hardly hidden in a mousehole.

D. Congress's Inaction In The Face Of VA's Application Of §3327 To All Veterans Confirms That Congress Intended It To Operate That Way

As we explained in our opening brief, the legislative history of §3322 and §3327 confirm that Congress meant what it said—§§3322(d) and 3327 apply to all veterans who meet their terms without regard to their periods of service. *See* Open. Br. Sections I.C & II.B. Mr. Rudisill's response is, once again, notable for what it does not dispute.

He does not dispute that Congress did not amend §3322(d) to add a limitation based on periods of service when it was drawing that very distinction in

enacting §3322(h). *See also* Open. Br. Section II.B. Nor does he dispute that Congress did not amend the provisions of §5003(c) to add a limitation based on periods of service when Congress re-enacted and codified them as §3327. *See also* Open. Br. Section I.C. This legislative inaction is, by itself, powerful evidence that Congress intended §3322(d) and §3327 to apply to all veterans who met the criteria expressly set forth therein, and did not intend to exclude veterans with multiple periods of qualifying service. Mr. Rudisill's arguments about the extent to which Congress was aware of the VA's implementation of these statutes—even if credited—cannot undermine the fact that Congress was aware of the existence of the very distinction Mr. Rudisill is advocating, had ample opportunity to make this distinction, but refused to draw it in the sections at issue on at least three separate occasions.

Furthermore, Mr. Rudisill's argument that the "Secretary cannot identify any authoritative document Congress reasonably could be presumed to be aware of, setting forth in clear terms the Secretary was applying §3327 to veterans like Mr. Rudisill," Resp. Br. 55, is simply wrong. The VA has never made any secret of the fact that it required veterans to relinquish MGIB eligibility when electing to use Post-9/11 benefits and limiting the amount of those Post-9/11 benefits to the period of unused MGIB entitlement. Mr. Rudisill himself acknowledges that the VA application form always explicitly said so and "require[d] *every applicant* for

Post-9/11 benefits [to] make an election if they have remaining entitlement under another program." Resp. Br. 6 n.1 (emphasis added) (citing Appx711). And even if Mr. Rudisill does not consider the VA application form an "authoritative document"—whatever that means—there are other obvious options.

At minimum, the VA's implementation of §3327 as applicable to all veterans with unused MGIB benefits is apparent from 38 C.F.R. §21.9550(b)(1), which limits the entitlement to Post-9/11 benefits "to one month (or partial month) of entitlement under [Post-9/11] for each month (or partial month) of unused entitlement under [MGIB]." This regulation was promulgated in 2009 and has been in effect throughout the life of the Post-9/11 program. As such, it was also in effect when Congress re-enacted §5003(c) of the original Post-9/11 Act as §3327—without changing the criteria for the veterans it applied to.[9] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978).

[9] Contrary to his assertion, the House Report Mr. Rudisill cites, Resp. Br. 55-56, demonstrates that Congress understood these provisions to apply to all veterans "with remaining eligibility for other education programs administered by VA" when "convert[ing] to the Post-9/11" program. H. Rpt. 114-358 at 40. The report mentions no limit on their application beyond "remaining eligibility" for another program.

At bottom, there is no question that Congress had both the opportunity and the tools and awareness necessary to draft §3322(d) and §3327 to operate the way that Mr. Rudisill and the Veterans Court majority advocates, but repeatedly chose not to. That was (and remains) Congress's choice to make; the Veterans Court majority's refusal to respect it is erroneous. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227-28 (2008).

III. The Veterans Court's Interpretation Cannot Be Justified By The "Pro-Veteran" Presumption

Throughout his brief, Mr. Rudisill suggests that enforcing the directives of §3322(d) and §3327 against him would be unfair, not "veteran-friendly", and contrary to a sensible system of education benefits. *See*, *e.g.*, Resp. Br. 27, 50-52. The upshot of his arguments appears to be two-fold: (1) that §3327 takes away or requires the veteran to "forfeit" benefits he or she earned; and (2) that education benefits always reward longer service. Neither premise is true.

First, there is no question that veterans with dual entitlement to MGIB and Post-9/11 can use both programs and can obtain 48 months of education benefits. They simply cannot do so under all circumstances. As Mr. Rudisill's own example shows, he will use both programs regardless of the outcome of this case: he has already used MGIB benefits and, upon his election, was awarded Post-9/11 benefits. And he also indisputably had the ability to obtain 48 months of benefits had he exhausted his MGIB entitlement before electing to use Post-9/11. That the

option Mr. Rudisill wishes existed—48 months of benefits overall and starting Post-9/11 benefits right away—is one Congress chose not to make available does not change the fact that no one is "taking away" Mr. Rudisill's right to use either MGIB or Post-9/11 benefits, nor is anyone requiring him to give up 12 months of benefits.

Indeed, the whole idea that receiving 36 months of education benefits total means the veteran is "giving up 12 months," is built on a fundamentally erroneous assumption regarding what Congress intended as the presumptive entitlement to education benefits. Only if the default entitlement is 48 months can the veteran be said to be "giving up" 12 months to begin using Post-9/11 benefits without exhausting MGIB benefits. But in fact, the default entitlement for education benefits is plainly 36 months—which logically corresponds to a four-year degree—under both MGIB and the Post-9/11 programs. The possibility of obtaining 48 months of entitlement remains, consistent with its historical roots, as an exception to this default rule afforded under certain circumstances to veterans with multiple entitlements—but those circumstances are not, and have never been, an unfettered expansion based only on additional periods of service. In other words, a veteran with dual entitlement to both MGIB and Post-9/11 is not "forfeiting" 12 months of benefits by electing the Post-9/11 program with unused

MGIB benefits remaining, he or she has the opportunity to obtain an additional 12 months of entitlement by exhausting MGIB benefits first.

Mr. Rudisill's second premise is that longer periods of service are always rewarded with additional education benefits, *i.e.* that these benefits are intended "to assist [the] longest serving veterans." Resp. Br. 52; *id*. at 51 ("Congress has always provided additional GI Bill benefits for additional qualifying service."). Notably, Mr. Rudisill offers no citation for this proposition, and indeed, there is no such simple linear relationship. To the contrary, Congress has always established thresholds where additional service beyond that point does not result in additional education benefits. Both the MGIB and Post-9/11 programs are consistent with that approach: under MGIB, 3 years (plus a contribution) typically maxes out the benefits available for active duty service; under Post-9/11, 3 years of service does the same (no contribution required). 38 U.S.C. §§3013(e); 3311(b); 3313(c). Thus, although the relationship between the MGIB and Post-9/11 programs is unique among the history of GI bills—two parallel ongoing active duty programs—the fact that the voluntary election in §3327 would limit a veteran to 36 months total of benefits, notwithstanding "extra" periods of service, is not an aberration.[10]

[10] Incidentally, Mr. Rudisill is also wrong that "[s]ince 1976, when the first programs with overlapping qualifying service criteria were enacted, every GI Bill program has required veterans to credit each period of qualifying service to a

In the end, the limit imposed by §3327(d)(2)(A) is no more a "forfeiture" of benefits than is the 48-month limit imposed by §3695 itself. In both circumstances, the veteran receives fewer months of benefits than a straight sum-of-all-parts of his or her individual entitlements. But there can be no doubt in either case that that is what Congress intended.

Nor does the application of §3327 and §3322(d) in accordance with their unambiguous terms "limit[] benefits based on when an application is filed," as Mr. Rudisill argues. Resp. Br. 52. Unlike, for example, disability benefits, which are based on the date the application is filed (*see* 38 U.S.C. §5110), §3327 limits entitlement based on the benefits the veteran has already received and the choice the veteran makes about his or her future benefits, not the date of claim. The filing of an application is merely the mechanism by which a veteran communicates that choice.

Thus, Mr. Rudisill is simply wrong that "Congress would have had to believe they were taking away benefits available to post-9/11 veterans under other programs, should they want Post-9/11 benefits, and limiting the amount of those benefits based solely on when applied for, not whether any duplication of benefits

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single program." Resp. Br. 12. Although each GI bill had its own unique provisions, including in how it dealt with various duplication of benefits issues, for most of this history, veterans were only required to credit periods of service with respect to reserve, rather than active duty, service.

for the same service occurs" in order for §3322(d) and §3327 to apply to him. Resp. Br. 49. None of those things are true regardless.

And Mr. Rudisill was not tricked into some "trap for the unwary." Resp. Br. 52. His options and their consequences were unambiguously set forth on his application form, Appx541, Appx711; the VA's instructions explicitly warned veterans to "carefully consider" their decision and offered assistance before they "make a choice," Appx709; and knowing what the consequences were, Mr. Rudisill exercised one of the options that Congress gave him. There is nothing improper about choices having consequences. What would be improper is what the Veterans Court majority did—ignoring Congressional directives simply because it did not like the consequences.

Ultimately, the "pro-veteran" canon can neither be used to contravene Congress's unambiguous directives, as the Veterans Court did here, nor does it even unambiguously support the majority's interpretation in this case. Mr. Rudisill focuses exclusively on one aspect of the overall scheme and ignores the rest of §3327, but his argument would remove veterans with multiple periods of service from the application of *all* of its provisions, including the ones that unambiguously inure to the benefit of veterans.

For example, §3327(h) empowers the Secretary to ensure that veterans are electing between MGIB and Post-9/11 benefits in their best interests. As Mr.

Rudisill's amici recognize, such provisions where "Congress expressly directs other government officials to assist veterans in obtaining benefits" are at the heart of the "unique relationship" between veterans and the United States that drives the "pro-veteran" canon of construction. Am. Br. 14-15. Similarly, the amici argue that "[i]t would *violate* the pro-veteran canon to treat two groups of veterans differently when they served the same amount of time." *Id*. at 17 (emphasis added). But that is exactly what the Veterans Court decision does. *See* n.11, below.

At bottom, the fact that Congress could have set up a program that is more generous in certain respects, like the one Mr. Rudisill envisions, cannot change the parameters of the program actually passed. It is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury"; "[a] court is no[t] [] authorized to overlook … [a] valid requirement for the receipt of benefits." *Schweiker v. Hansen*, 450 U.S. 785, 788, 790 (1981) (internal citation and quotation omitted).

And the only thing Mr. Rudisill's chart of hypotheticals proves—to the

extent it has any meaning[11]—is that Congress afforded veterans with dual eligibility for MGIB and Post-9/11 benefits flexibility to choose how and when to use the two programs, but that flexibility was not unlimited. There is nothing "absurd" about different choices leading to different results. *Cf.* Resp. Br. 57.

[11] Mr. Rudisill's table is built on assumptions that are unsubstantiated. For example, he ignores the possibility of exhausting MGIB benefits before applying for Post-9/11 benefits. He also ignores the effect of §3327(h) which allows the Secretary to prevent veterans from making elections that are clearly against their interests.

And he appears to presume that "separately qualifying periods of service" simply means serving more than the threshold required to qualify for either MGIB or Post-9/11. *See*, *e.g.*, his first hypothetical ("[v]eteran serves continuously from 2001 to 2021" and "credit[s] 36 months of service to Post-9/11 program, and a separate 36 months of service to [MGIB]"). But the Veterans Court explicitly did *not* define what constitutes a "period of service". Appx29 n.15 ("[W]e haven't" "defined 'period of service.'" "That question remains open."). Thus, while Mr. Rudisill apparently has an opinion on how the VA should define it, Resp. Br. 32-33, that opinion has never been adopted by anyone with authority to bind the VA. And this Court should not, in the first instance, render a definition. In this case there is no dispute that Mr. Rudisill has multiple periods of service, and the only question is whether that characteristic, however defined, is a relevant distinction under §3322(d) and §3327.

Moreover, even under the guidance from VA that Mr. Rudisill cites, using re-enlistment to measure periods of service, Resp. Br. 33 n.11, his hypothetical is still inaccurate. For example, officers do not re-enlist—an officer serving "continuously from 2001 to 2021," would not have multiple periods of service that could be separately credited under §3322(h). Periods of enlistment also vary; therefore, even under this definition, veterans could serve the same overall amount of time and have a differing number of "periods of service."

CONCLUSION

The decision of the Veterans Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020 I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF. The filing was served electronically to all parties by operation of the Court's electronic filing system.

August 3, 2020

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)(1)

This brief complies with the type-volume limitation of Federal Circuit Rule 32(b). The brief contains 6,993 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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