2020-1637

In The

United States Court Of Appeals

For The Federal Circuit

JAMES R. RUDISILL,

Claimant – Appellee,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent – Appellant.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS ORIGINATING CASE NO.: 16-4134

BRIEF OF APPELLEE

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Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James R. Rudisill v. Robert L. Wilkie

Case No. 2020-1637

CERTIFICATE OF INTEREST

Counsel for the:
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Timothy L. McHugh

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
James R. Rudisill	James R. Rudisill	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

March 31, 2020
Date

/s/ Timothy L. McHugh
Signature of counsel

Please Note: All questions must be answered

Timothy L. McHugh
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Statement of Related Cases

No appeal from this civil action was previously before this or any other appellate court, other than the Court of Appeals for Veterans Claims from which the decision is being appealed.

Counsel is not aware of any case pending in this or any other court or agency within the meaning of the Rule 47.5 Practice Notes that will directly affect or be directly affected by this Court's decision in the pending appeal.

Jurisdictional Statement

For the reasons explained in Argument Section I, this Court does not have jurisdiction over this appeal.

Statement of the Issues

1. The Solicitor General must decide "whether, and to what extent, appeals will be taken" to this Court, "[e]xcept when the Attorney General in a particular case directs otherwise." 28 C.F.R. § 0.20(b); 28 U.S.C. 518(a). The Secretary took this appeal without the required authorization, and did not obtain it until 79 days after expiration of 38 U.S.C. § 7292's limitations period. Does this untimely authorization deprive the Court of jurisdiction?

2. 38 U.S.C. § 3322(d) allows certain veterans to "coordinat[e]" entitlement to Post-9/11 and certain other GI Bill educational benefits under § 3327, which in turn allows veterans with unused benefits under those other programs to "elect" to exchange them for Post-9/11 benefits. Do these provisions merely authorize obtaining Post-9/11 benefits based on service previously irrevocably credited to another program, thereby implementing Congress's historical bar on the duplication of GI Bill benefits based on the same qualifying service? Or do they, *sub silentio* and for reasons the Secretary has never explained, prohibit veterans with separately qualifying service from obtaining Post-9/11 benefits the same way as occurs under every other GI Bill program (*i.e.*, by simply crediting qualifying service not already attributed to another program)?

Introduction

The Court lacks jurisdiction over this appeal. The Secretary admits the Solicitor General had to approve the appeal, which occurred months after the notice-of-appeal deadline passed. Under Supreme Court precedent, the Solicitor General's belated approval does not confer jurisdiction.

Should the Court reach the merits, it should affirm. This case concerns how the Nation values and rewards service by its longest-serving post-9/11 veterans with GI Bill educational benefits. The parties agree the veteran here, FBI Special Agent James Rudisill, separately is entitled to two such benefits—the Montgomery and Post-9/11 GI Bills—due to nearly eight years of qualifying service. Like millions of his brothers and sisters in arms, Mr. Rudisill applied for the more generous Post-9/11 benefits before exhausting his Montgomery benefits. The question is whether doing so requires Mr. Rudisill, and those like him, to incur a penalty on their total months of benefits.

This dispute centers on whether 38 U.S.C. §§ 3322(d) and 3327 apply only to avoid the duplication of benefits for the same service. In Mr. Rudisill's view, they do—they allow veterans seeking Post-9/11 benefits based on service previously credited to another program to re-credit that service to the Post-9/11 program, upgrading their existing benefits. Veterans who can establish entitlement to Post-9/11 benefits with service not credited to another program, however, need not make this conversion. They can simply credit unused qualifying service to the Post-9/11 program under §§ 3311,

3312, and 3322(h)(1), and use both benefits up to a long-existing aggregate cap. Mr. Rudisill pursues this latter path.

In the Secretary's view, §§ 3322(d) and 3327 apply to *all* veterans as a string attached to their entitlements under multiple programs, notwithstanding § 3322(h)(1). To obtain *any* Post-9/11 benefits from separately qualifying service, Post-9/11 veterans must, for some unexplained reason, first *exhaust* their remaining Montgomery benefits. Otherwise, their Post-9/11 benefits are capped at whatever remaining Montgomery benefits they can trade at a 1:1 conversion ratio, meaning most post-9/11 veterans are inevitably forced to forfeit 12 months of valuable educational benefits they have earned through their service. The Secretary does not, and cannot, identify any conceivable purpose served by this system he claims is required by the statutory scheme. It isn't.

The Secretary reaches his bizarre reading—which attempts to justify an error in his benefits application form—by focusing almost exclusively on §§ 3322(d) and 3327. Even in isolation, these provisions do not support the Secretary's reading. When the statutory scheme, the Secretary's own implementing regulations, and the history and purpose of GI Bill programs properly are considered as a whole, the result is even clearer: long-serving veterans like Mr. Rudisill with separately qualifying service are not subject to the Secretary's nonsensical, veteran-unfriendly, relinquish-or-exhaust requirement.

Statement of the Case

I. Mr. Rudisill's Separately Qualifying Service

Mr. Rudisill's entire adult life has been about service to country. He served nearly eight aggregate years in the military. Appx5. From January 2000 to June 2002, he served as an enlisted soldier until he left the Army to attend college. Appx4. He later returned to the Army while simultaneously completing his undergraduate degree, after learning close friends had been killed in action. Between June 2004 and August 2011, he served nearly 5.25 more years, including two tours in Iraq and one in Afghanistan. Appx4–5, 524, 537.

During his service, Mr. Rudisill saw considerable combat. He suffered injuries in a suspected suicide attack and from roadside bombs. And as a cavalry scout platoon leader he helped save numerous American lives by turning back a Taliban assault on his remote outpost and directing medical evacuations under fire. His unit's 2010 to 2011 Afghanistan deployment with the elite 101st Airborne Division is documented in THE HORNET'S NEST (HighRoad Entertainment 2014).

Mr. Rudisill was highly decorated for his military service. He was awarded the Bronze Star, Combat Action Badge, Air Assault Badge, Afghanistan and Iraq Campaign Medals with multiple campaign stars, and Kosovo Campaign Medal. He also attained the rank of Captain before leaving the Army for the FBI, where he has combatted domestic terrorism by white supremacists and ISIS supporters. Appx537; *see* CBS News, *Bond Denied for 2 Accused of Plotting Church Attacks* (Nov. 12, 2015)

<https://perma.cc/7Q2R-8S53>; Department of Justice, *ISIS Supporter Sentenced to Prison for Firearms Offenses* (Feb. 12, 2018) <https://perma.cc/TPA2-S632>; Landon Shroder, *Domestic Terrorism Inside the FBI's Joint Terrorism Task Force in Richmond*, RVA Magazine, (Aug. 1, 2018) <https://perma.cc/9EDX-VGGS>.

Based on his military service, the parties agree Mr. Rudisill separately is entitled to both Montgomery and Post-9/11 benefits. Mr. Rudisill credited his January 2000 to June 2002 service to the Montgomery program and obtained 36 months of benefits. Appx4. Mr. Rudisill's Montgomery entitlement was established fully by July 2003, when he first applied for and received those benefits. Appx540. After using ~26 months of these benefits between 2003 and 2007, in 2015 Mr. Rudisill applied to receive 36 months of Post-9/11 benefits (the use of which would be capped at ~22 months to comply with 38 U.S.C. § 3695's 48-month cap on usage of benefits under different programs). He intended to use the Post-9/11 benefits to attend Yale Divinity School and become an Army chaplain. Appx4–5. He applied for these benefits based on service separate from that which established entitlement to Montgomery benefits (*i.e.*, service between June 2004 and August 2011). Appx5.

The Secretary, however, did not allow this, and instead gave Mr. Rudisill a Hobson's choice. If Mr. Rudisill wanted Post-9/11 benefits now, he was limited to what he could trade for his remaining Montgomery benefits (~10 months), capping his total benefits under both programs at 36 months. Alternatively, Mr. Rudisill could receive a total of 48 months of benefits, but only if he first exhausted his Montgomery benefits

and then applied for 12 months of Post-9/11 benefits. Neither scenario would allow Mr. Rudisill to obtain the full amount of Post-9/11 benefits available to him under 38 U.S.C. §§ 3312 and 3695, nor preserve his remaining Montgomery entitlement should he wish to resume using those benefits. The form Mr. Rudisill used to apply for Post-9/11 benefits gave him no other options. Appx583, Appx585. So, he "elected" to exchange his remaining Montgomery benefits for Post-9/11 benefits, sacrificing the full amounts of benefits due to him under both programs based on his separately qualifying service.[1]

II. Statutory and Regulatory Framework

a. Sections 3322(d) and 3327

The dispute centers on whether veterans[2] with unused Montgomery benefits are required to exhaust or exchange them in order to obtain Post-9/11 benefits, as opposed to simply crediting separately qualifying service to the Post 9/11 GI Bill under 38 U.S.C. §§ 3311, 3312, and 3322(h)(1). That dispute ultimately hinges on the proper reading of §§ 3322(d) and 3327.

---

[1] VA Form 22-1990 ("Form") was created in December 2008, four months before the Secretary promulgated his Post-9/11 regulations. It requires every applicant for Post-9/11 benefits make an election if they have remaining entitlement under another program. Appx711. The Form has not been corrected to conform with the regulations. https://www.vba.va.gov/pubs/forms/VBA-22-1990-ARE.pdf (Feb. 2020 ed.). Veterans must apply for Post-9/11 benefits using the Form. 38 C.F.R. § 21.1030(a)(1).

[2] The provisions at issue here apply equally to servicemembers, veterans, and eligible family members. For simplicity, Mr. Rudisill refers to all such individuals as "veterans" unless otherwise specified.

i. Section 3322(d)'s "Coordination" Provision

Section 3322 is titled "Bar to duplication of educational assistance benefits." Subsection (d), titled "Additional Coordination Matters," provides:

> In the case of an individual entitled to educational assistance under [the Montgomery or certain other programs] …, coordination of entitlement to educational assistance under this chapter [*i.e.*, the Post-9/11 program], on the one hand, and such chapters or provisions, on the other, shall be governed by the provisions of [38 U.S.C. § 3327].[3]

ii. Section 3327's "Instead of" Benefit-Exchange Election

Section 3327 is titled "Election to receive educational assistance." Subsection (a) provides categories of individuals that "may elect" to receive Post-9/11 benefits. The first category is individuals that have used some, but not all, of their Montgomery benefits. 38 U.S.C. § 3327(a)(1)(A). Subsection (d)(2) sets the terms of the voluntary election:

> **(2) Limitation on entitlement for certain individuals.—** In the case of an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection, the number of months of entitlement of the individual to educational assistance under [the Post-9/11 GI Bill] shall be the number of months equal to—
>
> (A) the number of months of unused entitlement of the individual under [the Montgomery program], as of the date of the election, plus

[3] Section 3322(d) refers to § 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008, which ultimately became § 3327.

> (B) the number of months, if any, of [transferred Montgomery] entitlement, [which is not relevant in this case].

iii. The Parties' Dueling Interpretations

Mr. Rudisill and the Secretary understand the "coordination" of benefits and the benefit-exchange election procedures under §§ 3322(d) and 3327 quite differently.

In Mr. Rudisill's view, the provisions merely implement Congress's long-standing bar on the duplication of benefits for the same service. A benefit-exchange election allows veterans to convert unused Montgomery benefits based on one block of qualifying service (a.k.a. a "period of service") to Post-9/11 benefits, should they choose. Congress intended this exchange to be beneficial to veterans, allowing those with service that would otherwise not count towards Post-9/11 entitlement, because it had been irrevocably credited to another program, to upgrade to the generous new Post-9/11 program. Congress, however, understandably limited the months of Post-9/11 benefits available to a 1:1 ratio to their unused Montgomery benefits, preventing windfalls of two full GI Bill benefits for the same service.

Veterans with *separately* qualifying service, however, do not need to make a benefit-exchange election. They can independently establish entitlement to Post-9/11 benefits by crediting qualifying service not already attributed to another program, consistent with 38 U.S.C. §§ 3311(b) and 3322(h)(1), and the Secretary's regulations. 38 C.F.R. § 21.9520(a). Because they can obtain Post-9/11 benefits this way, they need not

coordinate and exchange unused Montgomery benefits, with its attendant limitations on total benefits, under §§ 3322(d) and 3327.

The Secretary believes that *all* veterans with partially used Montgomery (or other) benefits *must* exchange those benefits to obtain Post-9/11 benefits. That is, the Secretary interprets § 3327 to *prohibit* veterans from independently establishing entitlement to Post-9/11 benefits based on separately qualifying service (even though it never says any such thing). According to the Secretary, this bar applies only to those veterans described in § 3327. If a veteran can break free from § 3327—by exhausting his Montgomery benefits—he regains his ability to obtain Post-9/11 benefits by simply crediting separately qualifying service. Why Congress would want such a system is never explained.[4]

In resolving these dueling interpretations, a review of the broader statutory context is useful.

b. Purpose of GI Bill Programs

"The GI Bill is considered one of the most significant pieces of federal legislation ever produced." Dep't of Defense, *75 Years of the GI Bill: How Transformative It's Been* (Jan. 9, 2019) <https://perma.cc/484Z-5BKV>. It has transformed the lives of millions of veterans and the country. Appx2. It provides "veterans with education

[4] In theory, the Secretary's interpretation would also allow veterans to break free from § 3327 by renouncing other benefits instead of trading them in. *See* 38 U.S.C. § 5306. Again, why Congress would require that is never explained.

benefits to avoid high levels of unemployment, aid servicemembers in readjusting to civilian life, and afford returning veterans an opportunity to receive the education and training they could not pursue while serving in the military." *Id.*; Appx616–618. The purposes and policies imbedded in the original GI Bill are as relevant under today's programs as they were in 1944. *E.g.*, 38 U.S.C. §§ 3001 (Montgomery), 3301 note (Post-9/11 congressional findings).

c. Comprehensive Framework for Administration of All GI Bills

When Congress enacted the Post-9/11 GI Bill, it was not writing on a blank slate. The Post-9/11 program is part and parcel to over three-quarters of a century of educational benefits, all crafted to operate in harmony with each other. This is particularly relevant when considering the long-standing, critical societal, political, educational, military, and economic national interests and policies embraced and promoted by GI Bills.

These efforts have developed a robust scheme for the consistent administration of all GI Bill programs, individually and collectively. Qualifying service is the touchstone of this comprehensive framework, and properly recognizing and crediting qualifying service harmonizes it. All GI Bill programs share the same salient features to ensure this happens. As explained below, these features are that qualifying service:

- drives entitlement to benefits;
- may be used to establish entitlement to only one benefit; and,

- may be used to establish entitlement to other programs if not previously credited to another.

In short, additional service earns additional benefits, and the framework provides for the coordination of these multiple entitlements.

i. Entitlement is based on qualifying service.

Each GI Bill provides benefits based on the type and length of a veteran's service. *Carr v. Wilkie*, 961 F.3d 1168, 1169–70 (Fed. Cir. 2020). Qualifying service must also occur within a particular time period. Thus, a certain length of service during World War II entitled veterans to the original GI Bill, service during the Korean War entitled veterans to the Korean War GI Bill, and so on.

As relevant here, veterans that serve at least three years after June 30, 1985, are entitled to 36 months of Montgomery benefits. 38 U.S.C. §§ 3011(a), 3013(a).[5] Veterans that serve at least three years after September 11, 2001 are entitled to 36 months of Post-9/11 benefits at the maximum level. *Id.* §§ 3311(a)–(b), 3312(a).

ii. Any period of qualifying service may only be used to establish entitlement to one benefit.

To prevent windfalls, Congress has long barred entitlement to multiple benefits based on a single period of qualifying service. Congress implements this bar via two complimentary requirements—so-called "period of service" ("POS") elections across

[5] Some can serve as little as 2 years, depending on their service obligation. *Id.*

all programs, and so-called "in lieu of" ("ILO") benefit-exchange elections under § 3327 of the Post-9/11 program.

"Period of service" elections. Since 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 single program. *Id.* §§ 3033(c) (Montgomery); 3221(f) (Post-Vietnam); 10 U.S.C. §§ 16132(d) (Montgomery, Selected Reserve); 16163(d) (Reserve Educational Assistance Program). The Post-9/11 GI Bill follows suit, providing that "[a]n individual with qualifying service … that establishes eligibility … for educational assistance under this chapter" and others "shall elect … under which authority such service is to be credited." *Id.* §§ 3322(h)(1) (active duty service), 3322(c) (reserve service).

POS election provisions substantively identical to § 3322(h)(1) and (c) consistently have been interpreted by the Secretary to mean benefits under different programs may be used "alternately or consecutively … to the extent that the educational assistance is based on service not irrevocably credited to" another program. 38 C.F.R. §§ 21.7042(d)(4) (Montgomery); 21.7540(c) (Montgomery, Selected Reserve); 21.5040(g) (Post-Vietnam).

The Secretary's M22-4 Manual ("Manual"), which "provides implementing instructions" to VA employees and gives POS elections their name, further explains their role. Manual at Pt.1, § 1.01 <https://perma.cc/7AE3-BKCL?type=image>. A

POS election "point[s] a period of service to one benefit instead of another." *Id.* at Pt.3, § 3.10 <https://perma.cc/XUY8-JZSN?type=image>. It "is required for all benefits":

> A specific single period of service may not be used towards establishing eligibility for more than one benefit. Therefore, once a period of service has been applied toward a specific benefit, that period of service may not be used again toward a different benefit.

Id. at (a)(1). The Manual confirms that § 3322(h)(1) makes the Post-9/11 program fully "consistent with all other GI Bill programs" in regards to POS elections. *Id.* at Pt.4, § 3.02(a) <https://perma.cc/9DU8-HXPE?type=image>.

"In lieu of" elections. There is one exception to the rule that a period of qualifying service applied toward one benefit may not be used again toward another. It is found in the "Administrative Provisions" of the Post-9/11 program, titled "Additional coordination matters," and the § 3327 procedures it references. 38 U.S.C. § 3322(d).

As a backdrop to §§ 3322(d) and 3327, the Post-9/11 program, effective August 1, 2009, was retroactively applicable to service beginning on September 11, 2001. Therefore, Congress sought to address individuals with qualifying service who previously made a POS election for other benefits (*e.g.*, in 2003), and started using them. To give these veterans an opportunity to obtain the more generous Post-9/11 benefits for their qualifying service, Congress created an "instead of" benefit-exchange or, as the Secretary calls them in his Manual, "in lieu of"/ILO election procedures.

Section 3322(d) authorizes the "coordination" of entitlement to Post-9/11 benefits "on the one hand" with entitlement to other benefits "on the other." This

"coordination" proceeds under § 3327, which establishes voluntary procedures by which an individual "may elect" to receive Post-9/11 benefits "instead of" (*i.e.*, in lieu of) the other benefit. 38 U.S.C. § 3327(a), (d)(1); 38 C.F.R. §§ 21.9550(c), 21.9550(b)(1).

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. Manual at Pt.3, § 3.10 <https://perma.cc/XUY8-JZSN?type=image> (distinguishing the "two separate and distinct types of elections," POS and ILO); *see* 38 C.F.R. § 21.9520(c) (setting forth three distinct methods of establishing Post-9/11 entitlement, the first two being POS elections and the third an ILO election). The regulations and Manual make clear that ILO elections are unnecessary when crediting an unused (*i.e.*, previously uncredited) period of qualifying service to the Post-9/11 program via a POS election would establish entitlement without revoking another benefit. 38 U.S.C. § 3311(b)(1)(A); 38 C.F.R. § 21.9520(a).

For those who want to make an ILO election to qualify for Post-9/11 benefits, § 3327 resolves complexities of the exchange. It establishes authority for halting and/or refunding contributions to the Montgomery program, ensures incentives offered previously remain available, and allows benefits previously transferred to family members to remain available to them, among other things. 38 U.S.C. § 3327(b), (c)(3), (g). To prevent the duplication of benefits for the same qualifying service, § 3327 also limits the months of Post-9/11 benefits available as the result of an ILO election to the

months of unused Montgomery benefits converted. 38 U.S.C. § 3327(d); 38 C.F.R. § 21.9550(b).

iii. Qualifying service not credited to one benefit may be credited to another.

Once entitlement to benefits under one program is established via a POS and/or ILO election, the question of what to do with additional qualifying service not used to establish any entitlement remains. Many individuals serve longer than the three years typically necessary to establish entitlement to only one benefit, for example, under lengthy initial enlistments, reenlistments, or by reentering the military after separation. The comprehensive GI Bill framework provides an answer.

Qualifying service not used to establish entitlement to one benefit may be used to establish entitlement to another. *Carr*, 961 F.3d at 1170 (Mr. Carr's separately qualifying service earned him benefits under both the Vietnam-era and Post-9/11 GI Bills). This is made clear by Congress's affirmative regulation of such separately established entitlements, which takes two primary forms—prohibiting concurrent usage of multiple entitlements and limiting aggregate usage. *Id.* (Mr. Carr "would have been eligible for 36 additional months of benefits under … the Post-9/11 GI Bill," after using ~41 months of Vietnam-era benefits, "except that § 3695 limited him to a cumulative total of 48 months").

Prohibition on concurrent usage. Since Congress created the Korean War GI Bill, it has permitted entitlement to multiple benefits based on separately qualifying service.

Benefits under multiple programs, however, may not be used "concurrently." *E.g.*, 38 U.S.C. § 3033(a)(1).

The Post-9/11 program's bar on concurrent receipt is in § 3322(a), which is implemented by 38 C.F.R. §§ 21.4022, 21.9690(a), and 21.9635(w). The latter regulation, citing § 3322(a) for authority, allows a veteran "in receipt of educational assistance under" the Post-9/11 program "who is also eligible for" benefits under another program to "choose to receive" benefits under the other program at certain intervals. When promulgating these rules, the Secretary explained they apply to individuals "eligible for the Post-9/11 GI Bill and another educational assistance program at the same time," who may make "elections" to switch between programs that "are not irrevocable eligibility elections" (as POS and ILO elections are). 74 Fed. Reg. 14,654, 14,661 (Mar. 31, 2009).

Thus, § 21.9635(w) and related Post-9/11 implementing regulations allow alternation between separately established entitlements. Such changes between programs may occur monthly or by term. 38 C.F.R. §§ 21.4022; 21.9690(b); 21.7143(b); 21.5022(a)(2).

Limitation on aggregate usage. Congress also regulates multiple entitlements by limiting their aggregate usage, as seen in *Carr*. Individual GI Bill programs typically provide 36 months of benefits. Thus, sufficient separately qualifying service could, on its face, establish entitlement to benefits under two or more programs for a total of 72 or more months of benefits—*i.e.*, 36 months under each program. Notwithstanding

this, since 1952, Congress has imposed an aggregate cap on combined usage of multiple entitlements, subject to certain exceptions not relevant here. 38 U.S.C. § 3695; *Carr*, 961 F.3d at 1170. This aggregate cap is 48 months. *Id.*

III. The Veterans Court's Decision

It is fair to say the Veterans Court's majority and dissenting opinions are two "ships passing in the night." Appx10 n.3. Like the parties' arguments, they advance "fundamentally different view[s] of what the statutes say." *Id.*

a. The Majority Opinion

The majority determined the unambiguous language of the statutory scheme provides the Post-9/11 and Montgomery programs "co-exist in a broader statutory scheme" and may be used concurrently up to the 48-month cap. Appx11 (citing 38 U.S.C. §§ 3322(a), 3033(a); 3312(a), 3013(c)). It believed, however, the "logistics" provision (38 U.S.C. § 3322) is ambiguous concerning who must make an ILO election to establish entitlement to Post-9/11 benefits. Appx10–12.[6] Nevertheless, the majority concluded Mr. Rudisill's reading implements the scheme as Congress intended, consistent with the Secretary's regulations. The majority repudiated the Secretary's

[6] The majority does not use the terms POS or ILO elections, but its rationale is the same. To the best of Mr. Rudisill's knowledge, the Secretary only recently published the POS/ILO sections of the Manual online. As a result, Mr. Rudisill did not cite them to the Veterans Court. Nor did the Secretary, whose counsel when pressed about whether there is "a Manual cite that would support the Board's decision," responded only: "No, Your Honor. I'm unfamiliar with that." Oral Arg. at 1:03:45–1:06:30, http://www.uscourts.cavc.gov/documents/BO.mp3.

interpretation as "odd," "absurd," and not "persuasive." Appx18, Appx23, Appx27 n.13.

A harmonious interpretation of 38 U.S.C. § 3322. The majority provided a "global interpretation of section 3322" to harmonize it internally, and with the rest of the program. Appx15–21. In short, it interpreted § 3322 as requiring an ILO election under subsection (d) and § 3327 only when Post-9/11 entitlement cannot be established by a POS election.

This interpretation was not informed exclusively by subsection (a), as the Secretary suggests. Sec'y Br. at 15. It was informed by the statutory scheme as a whole. The Secretary barely mentions the latter analysis, even though it makes up the bulk of the majority opinion. Sec'y Br. at 16. The majority's comprehensive analysis of § 3322 is summarized below, with its broader considerations first, followed by a subsection-by-subsection interpretation.[7]

The majority began by asking what Congress intended to accomplish through § 3322's provisions. It recognized that "[s]ome veterans served, left service, and utilized Montgomery benefits before Congress established the Post-9/11 program," whereas others served longer. Appx15–16. Looking to § 3322's heading, "Bar to duplication of educational assistance benefits," it concluded Congress was concerned only with

[7] Given the breadth of discussion, the majority's interpretation is spread throughout its opinion. Appx12.

"'duplication' or double-dipping," and "if there's no 'duplication,' there's no cause for concern." Appx16.

Regarding subsection (a), the majority noted its bar on concurrent receipt of benefits requires an election in a manner established by the Secretary, which indicated that § 3322(a)'s "election mechanism … [is] not section 3327." Appx 17. Instead, it is found in the Secretary's regulations, which prevent receiving benefits "from more than one program during … [an] applicable pay period, but" allows those with separately established entitlements to "switch freely between programs." Appx23, Appx26 (citing 38 C.F.R. §§ 21.4022, 21.9690, 21.9635(w)). Alternating or consecutive usage of Post-9/11 and other benefits therefore is possible and allowable under § 3322.[8]

The majority found that § 3322(b) and (c) prohibited double-counting service already credited towards repayment of a loan or reserve benefits program, explaining that "Congress clearly and understandably disfavored double-dipping in these respects." Appx19. It found nothing indicating "Congress worried more broadly about two full, separate program entitlements (subject to 38 U.S.C. § 3695's 48-month cap) based on *two or more* separate periods of service." *Id.*

Regarding § 3322(d), the majority found the title, "Additional coordination matters," indicated the subsection "works secondary to other provisions" to bring them

[8] The majority found subsection (e) substantively identical to (a) in pertinent part, and so not helpful in shedding additional light on the meaning of § 3322. Appx18.

"'into a common whole, to harmonize'" them, not to create with § 3327 "strings attached to educational assistance received under more than one program." Appx25. The majority declined to "assume a meaning in subsection (d)'s silence" as to whether it applies in a manner "that automatically disadvantages veterans." Appx21. It concluded subsection (d) applies only to a period of qualifying service "already positioned to use [other] benefits," when an individual "want[s] a second election." Appx25 (an ILO election).

The majority found additional support in § 3322(g), which bars concurrent receipt of transferred education benefits from more than one individual (*e.g.*, two veteran-parents). It requires an election "under which source to utilize such assistance at any one time." If Congress would permit a "person *who didn't personally serve in the military* to receive up to 48 months of *transferred* benefits," subject only to a bar on concurrent receipt, it would not "—through silence—also [have] intended to prevent a servicemember … from receiving extra benefits based on multiple, separately qualifying periods of service on the condition of a similar election mechanism." Appx18.

Finally, the majority found its reading harmonious with § 3322(h)(1), barring duplication of eligibility based on any single period of qualifying service. Section 3322(h)(1) was added to the statutory scheme in 2011 "to stop VA's practice of awarding two benefits (under two different programs for up to 48 months) for the *same* period of service"—namely only "'three years of service.'" Appx20 n.9 (quoting legislative history). Section 3322(h)(1) "mandate[s] a primary election, an initial choice

among programs for those who haven't yet tried to use educational assistance attributable to a single period of service." Appx25 (a POS election). Its reference to any single period of qualifying service "need not necessitate exclusivity of control over individuals with a single period of service." Appx24. Instead, as explained, subsection (d) similarly applies to such individuals if they want to re-credit that service. Appx25.

The majority also determined "[t]he Secretary's position … would render his own regulations inoperable surplusage, something we can't condone." Appx25–26. The regulations reflect "a reality … impossible in the Secretary's world" because they permit consecutive usage of benefits "in a way that the Secretary's position precludes." *Id.* Each of the regulations the majority discussed, *e.g.*, 38 C.F.R. §§ 21.4022, 21.9690, and 21.9635(w), cite § 3322 as their authority and allow for alternating consecutively between benefits, consistent with the majority's interpretation.

The majority found additional support in Congress's express inclusion of all GI Bill programs within § 3695's 48-month cap. Appx27–28. It refused to read §§ 3322(d) and 3327 as requiring an ILO election simply because one retains unused entitlement under another program. Otherwise, individuals with separately qualifying service would rarely realize the 48-month cap, rendering it "largely a nullity … something to be avoided." Appx27.

The majority also found its interpretation most consistent with Congress's purpose in barring duplication of benefits. The majority concluded the receipt of different benefits for separately qualifying service "can't possibly constitute" duplicative

benefits any more than "two different injuries in service, thereby independently qualifying the veteran for entitlement to service connection and [disability] ratings under two different diagnostic codes (up to a 100% rating cap)" would. Appx28.

Next, given the long history of allowing consecutive usage of separately established entitlements, the majority refused "to lightly presume Congress changed its historical approach …, especially when the change would not be a veteran-friendly one," and would not promote the broader purpose of the GI Bill. Appx28–29. Relatedly, the majority concluded "to the extent a question remained, if *Brown v. Gardner*, 513 U.S. 115, would ever have a real effect on an outcome, it would be here." Appx29. "Here, that [pro-veteran] doctrine counsels in favor of an interpretation of the statutory scheme to allow veterans with multiple periods of service to obtain benefits under both the [Montgomery] and the Post-9/11 GI Bill subject to the aggregate cap of 48 months." *Id.*

Based on its statutory interpretation, the majority concluded the Form imposed "[a] forced 'election' based on an incorrect legal interpretation." *Id.* Hence, the ILO election required by the Form of veterans with separately qualifying service "has no meaning at all"—a legal "nullity." *Id.*

b. The Dissent

As the Secretary states, the dissent focused myopically on §§ 3322(d) and 3327, Sec'y Br. at 16, and did not consider much else. It interpreted these sections as creating a "*completely voluntary statutory election process*" that allows any otherwise eligible individual

to elect Post-9/11 benefits before exhausting Montgomery benefits, "with the associated drawback" of an ILO election, discussed above. Appx33–34. It saw no relationship between those provisions and § 3322(h)(1), even though the dissent recognized the latter requires the Secretary "to establish a *regulation-based mandatory* [POS] election process." *Id.* Instead, the dissent interpreted § 3322(h)(1) as "explicitly appl[ying] only to *individuals* with a single period of service," not to any single *period* of qualifying service, as its language provides. Appx33 (emphasis added).

The dissent believed "whether an individual has multiple entitlements based on a single or multiple periods of service is not a factor for consideration under section 3322, including subsection (d)." Appx41. It refused to construe (d) in light of the rest of § 3322 or the larger statutory scheme, much less in favor of veterans. Appx37. The dissent's reading pulls within § 3322(d)'s scope *any* veteran who wants to obtain Post-9/11 benefits before exhausting Montgomery entitlement. *Id.*

The dissent also assumed Congress would have stopped the Secretary, had he been misapplying § 3322(d). Appx38. The dissent believed Congress was "aware of VA's implementation of section 3327" when it added § 3322(h)(1)'s POS election requirement to the program in 2011, citing a 2009 VA outreach letter to *veterans*, which the Secretary has since removed from his website. Appx38.[9] It assumed "since in

[9] It is unclear what this letter states, as it is unavailable online and no party has ever cited it.

subsection (h) [Congress was] clarifying that eligibility was restricted for those with a single period of service, it would have made sense for Congress to spell out that subsection (d) as well only applied to those with a [sic] multiple entitlements due to a single period of service." Appx39. The dissent also found compelling that Congress codified § 3327's ILO election procedures in 2016, in an effort to "improve" that process, but did not amend § 3322(d). *Id.*

Finally, the dissent took issue with the majority's contention that its interpretation gives the 48-month cap real meaning and is more veteran-friendly. Appx39–41. The dissent argued under its interpretation the cap is not a nullity for those "admittedly" rare individuals with separately qualifying service who exhaust 36 months of Montgomery benefits before using 12 months of Post-9/11 benefits. Appx39–40. It then argued the majority assigns "greater value and additional benefits to an individual with intermittent periods of active duty service than to individuals with a continuous period of active duty service," an argument the majority specifically rejected. Appx40; Appx29 n.15.

Summary of the Argument

I. This Court lacks jurisdiction. The Secretary admits he was required to obtain the Solicitor General's authorization of this appeal. He received it only *after* the notice-of-appeal deadline. This untimely authorization fails to confer jurisdiction. *Fed. Elec. Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) ("*FEC*"). Permitting the

Solicitor General to retroactively authorize appeals months late would grant him unilateral authority to extend jurisdictional deadlines, which is not allowed.

II. On the merits, the Veterans Court was right to conclude §§ 3322(d) and 3327 are not intended for veterans with "more than one period of separately qualifying service."

A. Veterans with separately qualifying service have service that meets the qualifying service criteria of the Post-9/11 program that has not been credited towards another educational benefit. Sections 3322(d) and 3327 only come into play when a veteran wants to establish Post-9/11 entitlement with a period of qualifying service previously credited towards another program.

B. The plain language of the statutory scheme and the Secretary's own implementing regulations support the Veterans Court's interpretation. 38 U.S.C. § 3322(h)(1) allows veterans with separately qualifying service to credit unused service to the Post-9/11 program. It applies to any single period of qualifying service, not merely individuals with a single period of service and no more, as the Secretary argues. 38 U.S.C. § 3322(a) allows separately established entitlements to Post-9/11 and Montgomery benefits to be used consecutively, but not concurrently. Provisions like § 3322(a) have a settled meaning under the GI Bill framework, as Congress has employed them and the Secretary has interpreted them for decades to allow alternating usage of benefits. Combined usage of benefits is also expressly contemplated and regulated by 38 U.S.C. § 3695's 48-month aggregate cap. This cap cannot be realized

under the Secretary's interpretation by any veteran who obtains Post-9/11 benefits before exhausting Montgomery benefits. In light of the foregoing, §§ 3322(d) and 3327 are not strings attached to Post-9/11 entitlement for veterans with separately qualifying service. They merely implement Congress's historical bar on the duplication of benefits for the same service.

C. Additional considerations weigh in favor of concluding §§ 3322(d) and 3327 cannot be read to impose a novel, onerous bar on entitlement through § 3322(d)'s directive to "coordinate" certain entitlements. First, Congress does not hide "elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is expected to address major questions about the operation of a statutory scheme in much clearer terms than that. Second, relatedly, under the pro-veteran canon of construction, any interpretive doubt about what Congress meant by "coordination" is resolved in veterans' favor. *Gardner*, 513 U.S. at 118.

D. Congress did not become aware of let alone acquiesce in the Secretary's application of §§ 3322(d) and 3327 to veterans with separately qualifying service. The Secretary's regulations validly implement the statutory scheme. Nothing in the post-enactment legislative history indicates Congress knew the Secretary was violating his own regulatory framework. The history indicates only that Congress sought in 2011 to

ensure veterans do not receive duplicate benefits for the same service, and in 2016 to improve application processing times.

E. Finally, the Secretary's interpretation leads to absurd, inequitable, veteran-unfriendly results, indicating it cannot be what Congress intended. Under the Secretary's interpretation, veterans receive varying amounts of benefits under the Post-9/11 and other GI Bill programs based not on their qualifying service, but on when they apply for Post-9/11 benefits. Some veterans with no more than three years of qualifying service receive 48 months of benefits, whereas others with 20+ years of qualifying service receive only 36 months. The Veterans Court's interpretation suffers none of these defects.

Argument

Standard of Review

Mr. Rudisill agrees the Court reviews statutory interpretations *de novo*. Sec'y Br. at 23. The Court does "not review factual determinations or the application of law to a particular set of facts" unless a constitutional issue is presented. *Boggs v. West*, 188 F.3d 1335, 1337 (Fed. Cir. 1999).

I. This Court Lacks Jurisdiction Because the Solicitor General Failed to Timely Authorize the Secretary's Appeal.

This Court lacks jurisdiction. As the Secretary admits, the Solicitor General was required to authorize this appeal, and he only did *after* the notice-of-appeal deadline. This untimely authorization fails to confer jurisdiction. *FEC*, 513 U.S. 88.

The Solicitor General was required to authorize this appeal. 28 U.S.C. § 518(a) provides "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in … the United States Court of Appeals for the Federal Circuit" unless "the Attorney General in a particular case directs otherwise." 28 C.F.R. § 0.20(b) assigns "to the Solicitor General" responsibility for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." The filing of a notice of appeal is a determination "whether" an appeal will be taken, and the Solicitor General was required to approve it here.

The Secretary acknowledges this requirement, and relied on it in opposing expedited briefing. Sec'y Opp. to Mot. for Expedited Schedule at 1 (ECF 12) ("Sec Opp.").

Here, the Solicitor General authorized the appeal *after* the notice-of-appeal deadline. The Secretary timely filed this notice, and ordinarily the Court would assume he did so with authority. *Am. Fed'n. of Govt. Employees, AFL-CIO v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989). This case is unique. A month after filing his notice, the Secretary admitted the Solicitor General had *not* authorized it. Sec. Opp. at 1. As the Secretary subsequently admitted, the Solicitor General did not do so until *79 days* after the notice-of-appeal deadline. Sec'y Reply in Supp. of Mot. for Extension of Time at 3 (ECF 19) (authorization received May 27, 2020).

This belated authorization does not rescue the Secretary's unauthorized notice. Under *FEC*, it is untimely. Untimely appeals from the Veterans Court deprive the Court of jurisdiction. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438 (2011).

In *FEC*, the FEC filed a petition for writ of *certiorari* without Solicitor General approval, as required by 28 U.S.C. § 518(a) and 28 C.F.R. § 0.20(a) (the Supreme Court corollary to § 0.20(b)). 513 U.S. at 90–91. There, as here, the Solicitor General authorized the appeal only retroactively, after the time to file had run. *Id.* at 90. The Supreme Court dismissed for lack of jurisdiction because "the effort of the Solicitor General to authorize the FEC's petition after the time for filing it had expired did not breathe life into it." *Id.* To ratify FEC's filing, the Solicitor General needed authority to file it "*at the time ratification was made*." *Id.* at 98.

FEC applies here. The Secretary lacked authority to take this appeal without the Solicitor General's approval. When the Solicitor General finally provided it, neither he nor the Secretary could have then filed the notice under the Court's jurisdictional statute. Permitting the Solicitor General to retroactively authorize appeals days, weeks, or, as here, months late effectively grants him unilateral authority to extend jurisdictional deadlines. That is forbidden under *FEC*.

The Secretary may try to distinguish *FEC*. He may argue *FEC* relied on 28 C.F.R. § 0.20(a) (governing petitions for certiorari) instead of § 0.20(b) (governing appeals to all other courts), but that is irrelevant. Both subsections expressly require the Solicitor General's authorization *before* taking action. And both implement 28 U.S.C. § 518(a),

which applies equally and uniquely to cases before the Supreme Court and this Court. Accordingly, this is a distinction without a difference.

He may argue that here, unlike in *FEC*, attorneys in the Department of Justice filed the notice of appeal. That would ignore the Secretary's admission he needed the Solicitor General's authorization, not just the approval of *any* Department attorney. Nevertheless, the Secretary may rely on a non-binding, pre-*FEC* decision that rejected a jurisdictional challenge on precisely this basis. *Hogg v. United States*, 428 F.2d 274, 277–80 (6th Cir. 1970); *see also United States v. Hill*, 19 F.3d 984, 991 n.6 (5th Cir. 1994) (following *Hogg*, pre-*FEC*, without analysis). *Hogg* does not apply.

Hogg's reasoning is outdated and inapt. It reasoned that although the Solicitor General had not timely authorized the appeal, his boss (the Attorney General) effectively had done so because a U.S. Attorney signed a "'protective' notice of appeal" in accordance with an internal policy. 427 F.2d at 279–80 & n.5. That policy today applies only when a "United States Attorney was lead counsel in the district court." Department of Justice Manual § 2-2.132 <https://perma.cc/2XH6-X26P>. That policy does not apply here because "[n]either the Department of Justice nor the Solicitor General had any involvement in the proceedings before the Veteran's Court," which is also not a "district court." Sec. Opp. at 8.[10]

[10] Any suggestion from *Hogg* that a party cannot question the process by which the Solicitor General approves an appeal has been superseded by *FEC*.

Hogg also reasoned that 28 C.F.R. § 0.20(b) did not "specify when the Solicitor General must render a decision with respect to prosecuting an appeal." *Id.* at 280. *Hogg* considered a prior version of § 0.20(b), which said the Solicitor General had to "authorize appeals" (without specifying when). *Id.* at 278 n.1. Now, § 0.20(b) requires the Solicitor General to authorize "*whether* . . . appeals will be taken" at all. 28 C.F.R. § 0.20(b) (emphasis added). Under *FEC*, that authorization must come *before* an appeal is filed.

The Solicitor General's authorization of this appeal came 79 days after the jurisdictional deadline under 38 U.S.C. § 7292. That is insufficient to establish this Court's jurisdiction. The Secretary's appeal must be dismissed.

II. The Statutory Scheme Does Not Require Veterans With Separately Qualifying Service to Make "In Lieu Of" Elections.

As to the merits of this case, the fundamental question is to whom do 38 U.S.C. §§ 3322(d) and 3327 apply? The Veterans Court concluded they do not apply to veterans "with more than one period of separately qualifying service" for educational benefits purposes. Appx2. This interpretation, unlike the Secretary's, harmonizes the statutory and regulatory scheme in an equitable way beneficial to all veterans and consistent with how GI Bill programs have always operated.

a. Separately Qualifying Service is Any Amount of Service that Meets a GI Bill Program's Entitlement Criteria.

It is important to explain what the Veterans Court meant by "more than one period of separately qualifying service." Appx2. The dissent misunderstood the majority, an error the Secretary repeats here.

The Veterans Court interpreted §§ 3322(d) and 3327 to apply whenever "dual entitlement [is] *based on* a *single* period of service." Appx15 (emphasis added). That is far broader than limiting the statutes to someone with a single period of service, and no more. The Veterans Court's interpretation encompasses someone with separately qualifying service where "one of the[ir] periods" "qualified him or her for benefits under more than one program." *Id.* (citing § 3322(d)). Thus, someone with two periods of separately qualifying service that could establish entitlement to benefits under, say, three programs must choose only two programs for those periods to be credited to under § 3322(h)(1). To the extent all such periods are already credited towards other benefits and Post-9/11 benefits are desired instead for one period, an ILO election is required for *that period* under §§ 3322(d) and 3327. Mr. Rudisill seeks to credit previously unused separately qualifying service to the Post-9/11 program.

To determine what a "period of service" is for these and GI Bill purposes generally, a veteran's actual service is layered on top of programs' qualifying service criteria. *E.g.*, 38 U.S.C. § 3311(b) (service after September 11, 2001, in varying lengths). Under the plain language of these criteria, periods of qualifying service do not need a gap in between them, as the dissent and Secretary would have it.

The Veterans Court's decision was clear on this. It explained it did *not* define the phrase "period of service" to exclude continuous service—instead, it purposefully left that definition open. Appx29 n.15. Thus, that Mr. Rudisill's service happens to be intermittent is not what makes it "more than one period of separately qualifying

service." Instead, it is the fact that his entitlement to multiple programs is based on service that does not overlap—it is "separately qualifying." Appx12.[11]

b. The Veterans Court's Reading Gives Full Effect to the Language of the Statutory and Regulatory Scheme.

The Secretary criticizes the Veterans Court because, he claims, the "majority refused to analyze the language of § 3327 at all." Sec'y Br. at 23. He argues § 3327 is "what enables Mr. Rudisill to" choose "Post-9/11 education benefits in lieu of the remainder of his [Montgomery] benefits" and "what controls the consequences thereof." *Id.* Among other things, he suggests the Veterans Court's interpretation draws distinctions regarding qualifying service "from thin air." *Id.* at 25.

The distinction identified by the Veterans Court is drawn from the plain language of the statutory scheme, not thin air. The Secretary fails to recognize this because he ignores the *other* first principle of statutory construction: it "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Hornback v. United States*, 601 F.3d 1382, 1385 (Fed. Cir. 2010) (quotations omitted).

The plain language of several interrelated Post-9/11 provisions control here—38 U.S.C. § 3322(h)(1), (a), § 3695, and § 3322(d) and § 3327. They provide,

[11] The Secretary's arguments are also at odds with his guidance to claims examiners on the Veterans Court's decision, which states "more than one period of service, includes re-enlistments," not just intermittent service. Interim Procedural Advisory: CAVC Decision -- B.O. v. Wilkie at 1 (updated June 3, 2020) (attached as Exhibit A).

respectively, that: (i) "such service" that is "qualifying service" under multiple GI Bill programs "is to be credited" to one program or another in the first instance; (ii) a period of separately qualifying service may be credited towards another program, benefits under which may be used alternatingly with benefits under the other program but not "concurrently"; (iii) separately established entitlements may be utilized up to an aggregate cap; and, (iv), as informed by the foregoing, the "coordination" of entitlement based on any single period of qualifying service must proceed under § 3327's ILO election procedures (if the veteran desires to exchange other benefits for Post-9/11 benefits for the same service).

Section 3327 retains a significant role under this plain reading, but only when necessary to prevent the duplication of benefits based on service previously credited to another program.

i. 38 U.S.C. § 3322(h)(1)

The Veterans Court could have started and ended with § 3322(h)(1). It provides:

> (h) Bar To Duplication of Eligibility Based on a Single Event or Period of Service.—
>
> (1) Active-duty service.—An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter [and the Montgomery or certain other programs], shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.

The statute is clear. As the Veterans Court explained, § 3322(h)(1) "mandate[s] a primary election, an initial choice among programs for those who haven't yet tried to use educational assistance attributable to a single period of service." Appx25 (a POS election). This choice is required for service eligible for any of the programs subject to § 3322(d) and § 3327. Section 3321(h)(1) gives Mr. Rudisill the right to attribute a period of qualifying service not attributed to his Montgomery entitlement to the Post-9/11 program to obtain benefits thereunder.[12] That is what he tried to do, indicating on the Form he was applying for Post-9/11 benefits with service post-dating the establishment of his Montgomery entitlement. Appx585 (crediting 2004 to 2011 service).

The Secretary argues, however, that § 3322(h)(1) applies only to "a *veteran with a single period of service* that could qualify … for a number of different benefits." Sec'y Br. at 36 (emphasis added). Thus, he adopts an interpretation of the statute he wrongly accuses the Veterans Court of employing, namely that § 3322(h)(1) narrowly applies only to individuals with no more than a single period of service. He claims the legislative history confirms "Congress knew exactly how the VA was applying the election provisions in § 3322(d) and § 3327 when it enacted § 3322(h)." *Id.* at 36–37. Despite this awareness, according to the Secretary, "Congress only thought it necessary to address, and change" the "phenomena" "that the same period of service could (at that

[12] That reading is consistent with § 3311(b)(1)(A), which requires only an aggregate of 36 months service to establish eligibility.

time) support dual entitlement" when it enacted § 3322(h)(1). *Id.* at 37. In support, the Secretary emphasizes Congress left "the broad all-encompassing language of § 3322(d) as is" in 2011. *Id.* at 38.

As explained in Section II.d., *infra*, Congress was not aware when it enacted § 3322(h)(1) that the Secretary was applying § 3327 to veterans with separately qualifying service. It suffices to say here the legislative history clearly indicates only that Congress was aware that the Secretary had not comprehensively implemented its bar on the duplication of benefits for the same active duty service through § 3327's ILO election procedures. That is because § 3327 does not expressly address the scenario of someone without separately qualifying service applying for Post-9/11 benefits *after* exhausting Montgomery entitlement. S. Rep. No. 111-346 at *19 (2010), *as reprinted in* 2010 USCCAN 1503 (discussing state of the law in 2010).[13]

Regardless, the language of § 3322(h)(1) and not the factual pattern(s) Congress might have had in mind when enacting it must be given effect. *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1750–51 (2020). Section 3322(h)(1) applies to any single period of "*qualifying service*," not *individuals* with no more than a single period of qualifying service. That is what it says, and how the Veterans Court interpreted it. Appx25. It did not, as

[13] Section 3322(h)(1) is titled "Active-Duty Service." It complements § 3322(c)'s pre-existing identical bar on the duplication of benefits for the same reserve service.

the Secretary claims, read it as "only applying to the same set of veterans" as § 3322(d). Sec'y Br. at 39.

Even if the plain meaning of § 3322(h)(1) was uncertain, the language Congress employed has been settled over the course of many decades under the comprehensive GI Bill framework. Congress is presumed to be aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute using the same terms. *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993). This is especially true of overlapping, interrelated schemes like the GI Bill framework, which should be given "'as great an internal symmetry and consistency as its words permit.'" *Id.* (citations omitted). "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989).

The Secretary cannot carry his burden. Section 3322(h)(1) requires "such service" that qualifies for multiple programs be "credited" to one or the other of those programs (*i.e.*, a POS election). The Secretary consistently has stated substantively identical POS election provisions permit alternating, consecutive usage of separately established entitlements. For example, the Montgomery program's § 3033(c) requires crediting "such service" that qualifies for multiple programs (including the Post-9/11) to one program or another. The Secretary has implemented § 3033(c) to expressly allow alternation between *Post-9/11* and other benefits "to the extent that the educational

assistance is based on service not irrevocably credited to" another program." 38 C.F.R. § 21.7042(d)(4).

The VA Manual says that § 3322(h)(1) makes the Post-9/11 program fully "consistent with all other GI Bill programs" in regards to requiring POS elections. Manual at Pt.4, § 3.02(a) <https://perma.cc/9DU8-HXPE?type=image>. POS elections allow a veteran to "point a period of service to one benefit instead of another," to ensure "[a] specific single period of service" is not "used towards establishing eligibility for more than one benefit." *Id.* at Pt.3, § 3.10, (a)(1) <https://perma.cc/XUY8-JZSN?type=image>.

The Secretary's position is inconsistent with the plain language of § 3322(h)(1), his regulations, and the Manual. The Veterans Court correctly interpreted § 3322(h)(1).

ii. 38 U.S.C. § 3322(a)

The other unambiguous indication ILO election procedures apply only to prevent the duplication of benefits is in § 3322(a)'s bar on concurrent receipt of benefits under multiple programs. It provides:

> (a) In General.—
>
> > An individual entitled to educational assistance under this chapter who is also eligible for educational assistance under [the Montgomery or other programs] … may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.

This provision is clear. It bars only "concurrent" receipt. The ordinary meaning of "concurrent" is "'running alongside, existing or happening together;' 'acting together, cooperating;' 'directed to, or intersecting in, the same point;' or 'having joint, equal authority.'" Appx17 (quoting dictionary). The majority found the statute charges the Secretary to develop a regulatory method of electing benefits under § 3322(a), which means § 3327 statutory procedures are *not* that election mechanism. *Id.*

The Secretary takes issue with the Veterans Court's consideration of § 3322(a) to inform its interpretation of § 3322(d). Sec'y Br. at 22.[14] The Veterans Court was right to look to § 3322(a). By its terms, it addresses simultaneous entitlement to Post-9/11 and other GI Bill benefits, just as § 3322(d) and § 3327 do. It then provides for a *different* form of election than § 3327. Thus, § 3322(a) contemplates something different than § 3322(d) and § 3327, and one must understand what that is to avoid reading the latter in a way that conflicts.

Fortunately, even if § 3322(a) was unclear (it is not), its meaning is settled because it, like § 3322(h)(1), employs language standard within the comprehensive GI Bill framework. Section 3322(a) is the Post-9/11 program-specific implementation of Congress's long-standing bar on "concurrent" receipt of benefits under multiple programs. Congress has long imposed a bar on "concurrent" receipt of benefits across

[14] The Secretary also repeats that Mr. Rudisill never indicated he wants to alternate between Post-9/11 and Montgomery benefits. *Id.* at 22, 43. That is irrelevant to the legal construction of § 3322.

all GI Bill programs. Pub. L. 98-223, § 203(b), 98 Stat. 41 (Mar. 2, 1984). Codified today at 38 U.S.C. § 3681(b), this bar provides: "No person may receive benefits concurrently under two or more of the provisions of law listed below." Congress has also since 1952 included program-specific bars on concurrent receipt of multiple benefits, including a mirror image of § 3322(a) under the Montgomery program at § 3033(a)(1).

Section 3681(b) and the program-specific versions of the "concurrent" receipt bar have been consistently construed by the Secretary, imbuing them with settled meaning. 38 C.F.R. § 21.4022 has implemented § 3681(b) since 1985. 50 Fed. Reg. 27,825, 27,826–27 (July 8, 1985) (promulgating prior version of § 21.4022). The program-specific versions have existed as long or longer. 38 C.F.R. §§ 21.5022(a)(2) (Post-Vietnam); 21.7143(b) (Montgomery). Each allow choosing between separately established benefits more than once *other than* within various intervals, like months or school term.

The Secretary has implemented § 3322(a) in this exact way. Section 3322(a)'s election mechanism prevents individuals from receiving benefits "from more than one program during … [an] applicable pay period, but" allow those with separately established entitlements to "switch freely between programs." Appx23, Appx26 (citing 38 C.F.R. §§ 21.4022, 21.9690, 21.9635(w)). The Secretary amended each of the program-specific provisions under the *other programs* discussed above when he implemented § 3322(a) to add the Post-9/11 program to each, for alternating purposes. *E.g.*, 74 Fed. Reg. at 14,670–71 (amending § 21.7143 under Montgomery program).

Section 21.9635(w) is particularly notable. Contemporaneous with its promulgation, the Secretary stated § 21.9635(w) applies to individuals "who are eligible for the Post-9/11 GI Bill and another educational assistance program at the same time," who may make "elections" to consecutively switch between programs that "are not irrevocable eligibility elections" like POS and ILO elections. *Id.* at 14,661.

Section 3322(a) plainly permits individuals to alternate between the Post-9/11 program and others without making an ILO election.

iii. 38 U.S.C. § 3695

Another unambiguous indication ILO elections cannot be required any time an individual is entitled to both Montgomery and Post-9/11 benefits is found in 38 U.S.C. § 3695(a). That provision provides:

> (a) The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof):
> …
>
> (4) Chapters 30, 32, 33, 34, and 36.

Chapters 30 and 33 are the Montgomery and Post-9/11 programs, respectively. The Veterans Court found it telling that Congress included them in § 3695, along with the other programs identified in § 3327. That inclusion is a strong indication Congress did not intend, through ILO election procedures, to limit the total months of benefits available under multiple programs in a way that would render § 3695 "largely a nullity."

Appx27 n.13. The Secretary responds that the Veterans Court's concerns are overblown for two reasons, neither of which are persuasive.

He suggests his misplaced interpretation of § 3322(h) means Congress thought the single route to 48 months outlined by the majority (exhausting Montgomery benefits before applying for Post-9/11) "was sufficiently likely that it enacted § 3322(h)(1) specifically to limit the availability of this practice only to veterans with multiple periods of service." Sec'y Br. at 44. As discussed previously, § 3322(h)'s plain language is not so limited, and has a settled meaning under the comprehensive GI Bill framework. It cannot be read as an extra-textual limitation on § 3695's 48-month cap, particularly when neither provision references the other.

The Secretary also points out that other GI Bill programs are identified in § 3695 that could be combined to allow veterans to realize its 48-month cap, claims § 3695 is just a "catch-all provision[]," and repeats this Court's explanation § 3695's chapter is "'not a source of veterans benefits.'" Sec'y Br. at 46 (quoting *Carr*, 961 F.3d at 1174). These arguments ignore what *Carr* held.

Carr considered whether Congress's separation of certain end-of-term extension provisions from § 3695's predecessor indicated an intent to no longer allow certain individuals to receive benefits *in excess* of 48 months. 961 F.3d at 1175. The Court held that § 3695 applied as an "initial entitlement calculation" that can be exceeded under program-specific end-of-term extension provisions. *Id.*

Here, the concerns are reversed, and far graver than in *Carr*. There 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 Montgomery entitlement. *Id.* at 1176. To the contrary, Congress expressly made the Post-9/11 program "subject to" § 3695, amended § 3695 to identify the Post-9/11 program alongside the Montgomery program for combined use, and made numerous corresponding revisions to other GI Bill programs to allow consecutive usage with Post-9/11 benefits. 38 U.S.C. §§ 3312(a), 3695(a)(4); *e.g.*, *id.* § 3033(a).

The legislative intent underlying the 48-month cap must be presumed to apply to the Post-9/11 program precisely as it does to all others, particularly without statutory language to the contrary. Further, as Congress explained, the 48-month cap "assist[s] the veteran in readjusting to civilian life following" lengthy service, "notwithstanding the fact that he had previously received a full 36 months of education or training under one or more of the other Veterans' Administration education assistance program[s]." Appx725 (legislative history). For example, a veteran with many years of military service may find he requires "a master's degree to successfully enter into a" civilian profession suited to him, and that "opportunity should be open to him. The notion is that we reward extra service and recognize that further education may be necessary for adequate readjustment." *Id.*

Mr. Rudisill has such "extra" qualifying service with which to separately establish his Post-9/11 entitlement. The Post-9/11 program's inclusion in § 3695 is a clear indication he can use it to obtain and use Post-9/11 benefits up to the 48-month cap, notwithstanding he used Montgomery benefits based on separately qualifying service.

iv. 38 U.S.C. §§ 3322(d) and 3327

Mr. Rudisill does not understand the Secretary to dispute everything above. The Secretary's position is, essentially, that veterans with separately qualifying service can obtain and use Post-9/11 benefits up to the 48-month cap, but *only* if they exhaust entitlement to other benefits first. *See* Sec'y Br. at 21 (arguing if Mr. Rudisill wants Post-9/11 benefits "now—while he still has unused [Montgomery] entitlement remaining" his entitlement is limited). Otherwise, veterans must make an ILO election and be stuck with its consequences, namely that they will receive no more than 36 months of total benefits under both programs, regardless of the amount of their service. *Id.* Thus, he effectively reads § 3322(h)(1) and § 3322(a) as being "subject to" § 3322(d) and § 3327. The statute does not say that.

Several things are clear about § 3322(d). It falls under the Post-9/11 program's broader bar to duplication of benefits section. Congress was concerned under § 3322(d) only with "'duplication' or double-dipping," so "if there's no 'duplication,' there's no cause for concern." Appx16. Thus, the "coordination" required must be understood to prevent duplication of benefits.

Consistent with common sense and historical practice, there is no duplication of benefits when entitlement to different programs is based on separately qualifying service. Appx28. Sections 3322(d) and 3327 merely implement the bar on duplication of benefits for the same service *after* a prior POS election has credited such service to another program. Appx25 (discussing role of § 3322(d) when an initial claim for a non-Post-9/11 benefit is pending or has been decided). Practically speaking, it is easy to understand why Congress would allow this. Veterans had been serving from September 11, 2001, and crediting their service to other programs for eight years prior to the effective date of the Post-9/11 program (August 1, 2009), which Congress made retroactively applicable. 38 U.S.C. § 3311. Congress wanted to ensure the maximum number of individuals, in 2009 and moving forward, could take advantage of its enhanced benefits befitting their "arduous" post-9/11 service. *Id.* § 3301 note.

The Secretary disputes the Veterans Court's conceptualization of ILO elections coming into play at the "application pending" stage of the GI Bill application process, and whether Congress would have enacted detailed legislation addressing it. Sec'y Br. at 38–39. Whatever the merits of that argument, it ignores that the Veterans Court also said § 3322(d) applies to changing an election *after* a decision. Appx25. Obviously, the overwhelming majority of ILO elections would (and do) occur at this stage, sometimes years after a POS election, as was almost universally true in 2009. The Secretary's "blink and you'll miss it" argument is irrelevant, and misstates what the Veterans Court actually held. Sec'y Br. at 39.

Because the Veterans Court concluded "coordination" is not required for veterans like Mr. Rudisill under the statutory scheme, it did not needlessly attempt to authoritatively interpret § 3327. Appx13. Nothing about § 3327 alters the Veterans Court's interpretation of the rest of the statutory scheme.

Section 3322(d) explains § 3327's role ("coordination") and is the *only* provision of the Post-9/11 program that references § 3327. For example, the Post-9/11 program's core provisions establish the duration of Post-9/11 entitlement is subject to § 3695's 48-month aggregate cap, but not § 3327. 38 U.S.C. §§ 3311(b)(1)(A), 3312(a). Section 3327 lacks independent significance as a "string[] attached to educational assistance received under more than one program," despite the Secretary's argument. Appx25. It is implicated only where "coordination" of benefits is required under § 3322(d). *Id.*

Moreover, § 3327 says individuals "may elect" to receive Post-9/11 benefits "instead of" a benefit identified under § 3322(d). 38 U.S.C. § 3327(a), (d). The provision then lays out who is "eligible to elect participation in" the Post-9/11 program in this manner, and the consequences thereof. *Id.* § 3327(a). These consequences include halting and/or refunding Montgomery contributions, ensuring incentives previously offered remain available, and allowing Montgomery benefits previously transferred to family members to remain available, among other things. 38 U.S.C. § 3327(b), (c), (g). Additionally, § 3327 limits the months of Post-9/11 benefits available as the result of

an ILO election to the months of unused Montgomery entitlement converted. 38 U.S.C. § 3327(d); 38 C.F.R. § 21.9550(b).

Several things are clear about § 3327. It speaks in permissive rather than mandatory terms, meaning it is not the exclusive way of obtaining Post-9/11 benefits. 38 C.F.R. §§ 21.9520(a)–(c) (outlining three ways of establishing Post-9/11 entitlement, only one of which requires an ILO election). It prevents the duplication of benefits under the Montgomery and Post-9/11 programs by those who must make an ILO election by limiting the amount of Post-9/11 benefits to the amount of converted Montgomery benefits. It allows transferred Montgomery benefits to remain payable under that program, which suggests § 3327's goal is not to ensure all months of Montgomery benefits are exhausted or converted before obtaining Post-9/11 benefits. Instead, it is about crediting and rewarding any single period of qualifying service.

c. Congress Did Not Hide the Secretary's Onerous Bar on Entitlement in the Word "Coordination".

If the plain language of the statutory scheme were not enough to conclude the Veterans Court's interpretation is correct, two additional considerations compel it. Under the major questions doctrine, 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). Congress does not hide "elephants in mouseholes." *Whitman*, 531 U.S. at 468. Equally, given the rule interpretive doubt in veterans' benefits statutes is resolved in veterans' favor, *Gardner*, 513 U.S. at 118, a vague term such as

"coordination" should not be interpreted to impose the Secretary's bar without a much clearer indication Congress intended it.

i. Congress would not resolve a major question central to a veterans' benefits statutory scheme in such vague terms.

Courts "expect Congress to speak clearly" when it makes decisions of vast 'economic and political significance.'" *UARG v. EPA*, 573 U.S. 302, 324 (2014) (citations omitted). They do not presume Congress to decide issues central to statutory schemes in a "cryptic … fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Congress does not, after all, "alter the fundamental details of a … scheme in vague terms or ancillary provisions—it does not … hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

The Post-9/11 program provides ~$10 billion dollars in benefits to hundreds of thousands of servicemembers, veterans, and family members every year. It serves vital national interests of recruiting and retaining an all-volunteer military. It recognizes and rewards qualifying service to allow returning veterans to adequately readjust to civilian life.

Consistent with the foregoing, it cannot be that Congress intended post-9/11 veterans exhaust or relinquish entitlement to benefits established with separately qualifying service under § 3322(d)'s requirement to "coordinate" entitlements. During passage of this provision, the principal focus of debate was on encouraging *additional* service. Joseph Keillor, Note, *Veterans at the Gates: Exploring the New GI Bill and Its*

Transformative Possibilities, 87 WASH. U. L. REV. 175, 177–81 (2009) (collecting and discussing legislative history, public statements, and news reports). If Congress believed separately qualifying (*i.e.*, additional) service were irrelevant under the Post-9/11 program, one would expect there to be some discussion of this in the legislative history. The Court would search in vain for any such discussion.

It is hard to fathom that Congress understood § 3322(d) as an unprecedented limit on dual entitlements. Members of 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 for the same service occurs. Again, the Court would search in vain for evidence of this in the hisotry.

If Congress intended that result, it would not have implemented it through § 3322(d)'s directive of "coordination." Instead, Congress would have spoken clearly by amending the Post-9/11 program's entitlement duration provision (38 U.S.C. § 3312), sunset or modified the Montgomery program itself, or added a unique limitation for Post-9/11 benefits when combined with other benefits under § 3695. *See Carr*, 961 F.3d at 1174 (§ 3695(b)–(c) are special limits for covered programs). It did none of those things. Instead, it called for "coordination" of benefits by some individuals in its traditional bar to duplication of benefits administrative provisions, and buried the procedures for that coordination in a statutory note that did not rate

inclusion in the U.S. Code until re-enacted and placed at the backend of the Post-9/11 statute.

On this background, there can be no basis to believe Congress intended what the Secretary argues.

ii. The liberal construction given veterans' benefits statutes demands a clearer statement before finding an extraordinary new limitation.

Additionally, any "interpretive doubt is to be resolved in" veterans' favor. *Gardner*, 513 U.S. at 118. "The pro-veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit." *Procopio v. Wilkie*, 913 F.3d 1371, 1383 (Fed. Cir. 2019) (*en banc*) (O'Malley, J., concurring). Like the analogous pro-Indian canon, the pro-veteran canon counsels against "lightly infer[ing]" derogation of benefits, instead requiring veterans' benefits statutes "be construed in favor" of rights. *McGirt v. Oklahoma*, __ S. Ct. __, 2020 WL 3848063, at *11 (July 9, 2020); *Procopio*, 913 F.3d at 1386–87 (comparing canons) (O'Malley, J., concurring). At bottom, "the pro-veteran canon recognizes this country's equitable obligation to 'those who have been obliged to drop their own affairs to take up the burdens of the nation.'" *Id.* at 1386 (citations omitted).

Any perceived ambiguities in statutes should be resolved through application of traditional tools of statutory construction, such as the pro-veteran canon. *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) (a statute is "ambiguous" only *after*

exhausting such tools).[15] The Veterans Court concluded "to the extent a question remained," if the pro-veteran canon "would ever have a real effect on an outcome, it would be here." Appx29.

The Veterans Court's application of the pro-veteran canon at the backend of its statutory analysis, to remove any possible doubt remaining about Congress's intent, was the correct approach. It interprets the statutory scheme as an effort by Congress to equitably recognize and reward qualifying service.

Congress has always provided additional GI Bill benefits for additional qualifying service. It does not lightly require forfeiture of those benefits for that service. 38 U.S.C. §§ 6104 (treason), 6105 (subversive activities), 5303 (certain disfavored discharges or dismissals, but only for benefits "based upon" the period of service in question). There is no clear indication Congress intended to deviate from these practices silently by requiring exhaustion or relinquishment of GI Bill benefits under other programs earned through separately qualifying service under § 3322(d)'s "coordination" requirement.

Moreover, the Secretary cannot explain *why* Congress would require that. The Veterans Court's interpretation gives voice to equitable legislative policy, consistent with Congress's past practice of barring the duplication of benefits for the same service only and the Secretary's own Post-9/11 program implementing regulations. The

[15] To be clear, the Secretary neither requests nor is entitled to *Chevron* deference. The plain language of the statutory scheme controls, particularly after application of all traditional tools of statutory construction, as compelled by *Chevron* itself. *Id.*

Secretary's interpretation finds no precedent in veterans' benefits law. It is unrecognizable as the command of a Congress concerned with incentivizing recruitment and retention during a time of war, or fulfilling the Nation's desire to assist its longest serving veterans readjust to civilian life afterwards. Yet, as the Secretary explains it, it is effectively a trap for the unwary, limiting benefits based on when an application is filed, without concern for separately qualifying service. What rational legislative policy would require that?[16]

These are *extraordinary* red flags under the pro-veteran canon of construction. Indeed, the whole system is blinking red. The Secretary's interpretation is not what any Congress that cares about qualifying service of post-9/11 veterans intended.

d. Congress Was Not Aware the Secretary Was Violating the Statutory and Regulatory Framework.

The Secretary attempts to salvage his interpretation of § 3327 by claiming Congress was aware of that interpretation when it made amendments to the statutory scheme. Sec'y Br. at 29–30, 36-38. These arguments fail.

As to § 3322(h)(1), Congress was not aware of the Secretary's interpretation when it added this provision. The Senate Report the Secretary references uses the hypothetical of a veteran with only three years of qualifying service, which as discussed

[16] *Acree v. O'Rourke*, 891 F.3d 1009, 1013 (Fed. Cir. 2018) (VA "system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim."); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.").

is the standard length of service needed to obtain benefits under only one program or another, not two. S. Rep. No. 111-346 at *19 (2010), *as reprinted in* 2010 USCCAN 1503. Using that hypothetical, the Senate Report explains that under existing law such individuals could obtain Post-9/11 benefits after exhausting Montgomery entitlement "based on the *same* period of service." *Id.* (emphasis added). It reflects no understanding that the Secretary was forcing veterans with *separately* qualifying service (like Mr. Rudisill) through § 3327's procedures, nor endorsement by the Committee (let alone Congress as a whole) of a view that Post-9/11 benefits can only be obtained by such veterans after first relinquishing or exhausting Montgomery entitlement.[17]

The reality is much different. When the Post-9/11 program went into effect in 2009, countless individuals with no more than a single period of qualifying service had already separated from the military and exhausted their Montgomery entitlement. For example, an individual who served from 2002 to 2005, and attended college from 2005 to 2009, would have applied for the generous new Post-9/11 benefits upon learning of them. Because Congress's initial attempt through § 3327 of ensuring previously credited service was not double-counted did not *expressly* account for the situation of someone no longer entitled to benefits under another program, a loophole existed. Under the

[17] Even were the opposite true, "'language in a Committee Report without additional indication of more widespread congressional awareness' cannot invoke a presumption of general congressional awareness." *Schism v. United States*, 316 F.3d 1259, 1294 (2002) (citations omitted).

liberal reading given veterans' benefits statutes, such individuals could have received 12 months of Post-9/11 benefits under the 48-month cap, despite only having enough service for one benefit.

Through 3322(h)(1), Congress closed this loophole. It provided that *any* single period of qualifying service be credited to only one program or another. As the Senate Report recognizes, such amendment was needed to correct mistakes in the drafting of the original statute, which was enacted "outside the framework of the usual committee process," to make it fully consistent with all other GI Bill programs in requiring POS elections. *Id.* at *6, *19, 2010 USCCAN 1504, 1505 (§ 3322(h)(1) requires crediting of "*a* period of service") (emphasis added). As discussed elsewhere, the Secretary recognizes that § 3322(h)(1) does exactly that. Manual at Pt.4, § 3.02(a) <https://perma.cc/9DU8-HXPE?type=image>.

As to § 3327, the Secretary's arguments also fail. The presumption of congressional awareness applies only to terms whose meaning have become so settled over time it is proper to assume Congress knew of that meaning and intended it when it used the same terms. *Keystone Consol.*, 508 U.S. at 158–59. For example, terms such as the "such service" crediting and "concurrent" receipt bars, discussed *supra*, which Congress has included in every GI Bill program to serve specific functions for decades, are well-established. There are multiple problems with extending the same presumption to the Secretary's implementation of § 3327.

The Secretary's interpretation is found nowhere in and is in fact contrary to his implementing regulations, so Congress would have the opposite awareness. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). 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.

The Secretary's interpretation of § 3327's predecessor was also of recent vintage (seven years) in 2016 when Congress codified its language under § 3327. An unseasoned interpretation cannot be a basis for presuming congressional awareness, absent significant additional considerations. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589–90, n. 11 (2010).

Additionally, this is a case of first impression. There was no adjudicative decision Congress could have been aware of until the Veterans Court issued its decision. The Board's decision below, one of tens of thousands issued a year, was not published in an official reporter.

The available legislative history indicates only that Congress was concerned with improving application processing times when it codified § 3327's predecessor and added subsection (h)'s alternative election provisions. These revisions made in 2016 were first proposed in 2015. The House Report underlying the initial bill states when committee staff asked VA employees "what steps or processes could be changed to reduce processing times for Post-9/11 G.I. Bill claims," they were told about a choke point involving "irrevocable elections to convert" other benefits. H.R. Rep. No. 114-

358 (2015). Nothing in the history indicates Committee staff (let alone Congress as a whole or even the Committee) understood VA was forcing everyone through what is now § 3327.

Finally, Congress's re-enactment of § 3327 in its current location does not suggest Congress was aware of or intended to ratify any particular interpretation. Where courts have been willing to accept that such organizational changes have meant otherwise, there is far clearer evidence of Congress's knowing acceptance. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951) ("In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (discussing extensive legislative history, including proposed revisions to judicial construction); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 146 (1920) (reenactment four times over 24 years of consistent implementation).

The Secretary argues in passing that one Senator "was directly aware of Mr. Rudisill's plight" based on *pro se* correspondence with his office. *Id.* This too fails. Even assuming the Senator had all necessary facts, it does not demonstrate "Congress as a whole" was aware of what the Secretary was doing.

e. The Secretary's Interpretation Produces Absurd Results Unfriendly to Veterans.

Finally, the Secretary disputes that the Veterans Court's interpretation is more veteran-friendly. Sec'y Br. at 31–33. But it is—overwhelmingly so.

The Secretary's interpretation leads to absurd results.[18] The best way to illustrate this is to compare side-by-side hypotheticals under his interpretation and the Veterans Court's:

Hypothetical	**Veterans Court's interpretation**	**Secretary's interpretation**
Veteran serves continuously from 2001 to 2021. She applies for Post-9/11 benefits before using any Montgomery benefits.	Under § 3322(h)(1), the veteran makes POS elections to credit 36 months of service to the Post-9/11 program, and a separate 36 months of service to the Montgomery program. She receives full entitlement to benefits under both programs, which she may use consecutively as she sees fit subject to the 48-month cap.	Under § 3327, the veteran cannot alternate back and forth between benefits and must make an ILO election. She revokes her Montgomery entitlement. Her Post-9/11 entitlement is limited to the amount of revoked Montgomery benefits. She receives 36 months of total benefits, all Post-9/11.
Same as above, but veteran applies for Post-9/11 benefits after using 12 months of Montgomery benefits.	Same as above.	Same as above, but different breakdown of benefits: 24 of Post-9/11; 12 of Montgomery.

[18] The Secretary also argues that § 3327 is friendly to veterans like Mr. Rudisill because it allows them to pro rata recoup up to $1200 paid into the Montgomery program and continue certain incentives. *Id.* at 31–32. That is true only if veterans like Mr. Rudisill cannot retain and use both benefits up to the 48-month cap. Keeping and using even one month of Montgomery benefits is far more valuable than $1200. Appx3.

Same as above, but veteran applies for Post-9/11 benefits after using 35 months of Montgomery benefits.	Same as above.	Same as above, but different breakdown of benefits: 1 month of Post-9/11; 35 of Montgomery.
Veteran serves intermittently post-9/11 for a total of six years. She applies for Post-9/11 benefits after exhausting Montgomery benefits.	Same as above.	Exhaustion of entitlement is not addressed under § 3327, so this veteran obtains Post-9/11 benefits subject only to § 3695. She receives 48 months of total benefits: 12 of Post-9/11; 36 of Montgomery.
Veteran serves 36 aggregate months before August 1, 2011. She applies for Post-9/11 benefits after exhausting Montgomery benefits.	Section 3322(h)(1) bars the duplication of benefits for the same service. Veteran cannot obtain more benefits for her only qualifying service. She receives 36 months of total benefits, all Montgomery.	Same as above, even though veteran does not have separately qualifying service. Section 3322(h)(1)'s effective date somehow precludes its application to pre-August 1, 2011 service. Sec'y Br. at 35 n.13. This veteran receives 48 months of total benefits: 12 of Post-9/11; 36 of Montgomery.
Same as above, except service occurs after August 1, 2011.	Same as above.	Section 3322(h)(1)'s effective date makes it applicable to post-August 1, 2011 service. Veteran cannot obtain more benefits for her only qualifying service.

		She receives 36 months of total benefits (all Montgomery).

Plainly, the Veterans Court's interpretation is more friendly, equitable, logical, and consistent than the Secretary's. Congress could not have intended what the Secretary has done, and argues to continue.

Conclusion

For the foregoing reasons, the Court should dismiss for lack of jurisdiction. In the alternative, if the Court reaches the merits, it should affirm the Veterans Court's decision.

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(J) 2019 02 October: Interim Procedural Advisory: CAVC Decision -- B.O. v. Wilkie -Updated
Article ID: 554400000129880

Interim Procedural Advisory: CAVC Decision -- *B.O. v. Wilkie* -Updated October 2, 2019 Updated Jun 03, 2020

What Will Change: The Interim Procedural Advisory issued on September 23, 2019

regarding the Court of Appeals for Veterans Claims (CAVC) panel decision on a case called *B.O. (a pseudonym) v. Robert Wilkie, Secretary of Veterans Affairs* remains in effect. This updated advisory is to provide additional clarification and support.

As a reminder, B.O. v. Wilkie concerns whether a veteran with **more** than one period of qualifying service must **relinquish or exhaust entitlement** under the **Montgomery GI Bill** education program (chapter 30 benefits) before receiving education benefits under the Post-9/11 GI Bill program (chapter 33 benefits).

Q1: What is considered more than one period of qualifying service?

A1: For the interpretation for this interim procedural advisory, more than one period of service, includes re-enlistments and call-ups. This decision means that, contrary to current VA practice, a veteran with more than one period of qualifying service need not relinquish or exhaust entitlement under chapter 30 for benefits before receiving education benefits under chapter 33 benefits.

Q2: Does the date August 1, 2011, which established the issue of same period of service, effect decisions associated with B.O. v. Wilkie?

A2: No, August 1, 2011 is not a factor in B.O. v. Wilkie claims.

Q3: What should be done with claims received through Appeals Modernization Act (AMA) as Higher Level Review, Reconsideration Supplemental Claims, etc.?

A3: Until a final determination on B.O. v. Wilkie has been issued, claims which fit the criteria, received through AMA process, should be deferred for decision. (Place in TIMS queue BVW for 30 days).

Q4: What if a claimant contacts Education Call Center (ECC), expresses hardship, and falls under B.O. v. Wilkie criteria?

A4: Until B.O. v. Wilkie procedures are finalized, Education Service has been advised there should be no new decisions made. However, if the ECC receives a hardship request, only then should you process the Certificate of Eligibility (COE) and/or issue payments in accordance with current procedures, notwithstanding B.O. v.

Wilkie. However, these claims should remain under TIMS control and placed in the BVW queue until final procedures has been issued.

Q5: Should VCEs (at this point) develop for reenlistments (when these are not apparent in the file)? For example, if service is shown from 2010 to 2016 (3-year term of enlistment), would we go to DPRIS to see if we can find reenlistment documents,

etc.? Or just process Ch33?

A5: As the advisory explains, if an original claim and meets the 4 criteria, place the claim in the BVW queue as instructed. If

EXHIBIT A

a supplemental claim, process chapter 33 as usual.

What RPO Action is Needed: Education Service continues to work with General Counsel regarding the development of procedures to correctly adjudicate claims under B.O.

Until those procedures are finalized, the following actions are required.o

1. For **original** chapter 33 claims:

VCEs will have to carefully review for the following:

To be considered under B.O. v. Wilkie, the following must exist:

1. Claimant applies for chapter 33 benefits.
2. Claimant has more than one Period of Service (POS)
3. Claimant indicates relinquishment of chapter 30 benefits
4. Claimant has used some of original chapter 30 benefits.

B.O. v. Wilkie provides that the claimant who has more than one POS applies the first POS to the chapter 30 benefit and the subsequent POS's apply to chapter 33 benefits. This court case indicates the limitation to months of entitlement under chapter 33 is 48 months. Previously VA only allowed the chapter 30 entitlement transferred to be the remaining entitlement.

When the VCE identifies an original chapter 33 claim which meets the criteria for BO v. Wilkie, the VCE should place in a new TIMS queue entitled BVW. In the TIMS facility code field, the VCE should insert BVW. The end product should be disp'd for 30 days from the date of action to O-BVW.

2. Chapter 33 **supplemental** claims. No special action is required at this time. Automation will not be paused.

This interim advisory will remain in effective from the date it is issued until permanent guidance is issued which either modifies or rescinds this document.

Questions: If you have any questions, please direct them to the Procedures Team at POLPROC.VBACO@va.gov

V/R

Procedures Team

You can view this article at:
https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001048/content/554400000129880/J-2019-02-October-Interim-Procedural-Advisory-CAVC-Decision-BO-v-Wilkie-Updated

EXHIBIT A

Certificate of Filing and Service

I hereby certify that, on July 13, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Federal Circuit Rule 35(d) and Fed. R. App. P. 35(b)(2) because:

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