

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMES R. RUDISILL,)
)
 Petitioner,)
)
 v.) No. 22-888
)
 DENIS R. McDONOUGH, SECRETARY OF)
)
 VETERANS AFFAIRS,)
)
 Respondent.)

Pages: 1 through 78
Place: Washington, D.C.
Date: November 8, 2023

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JAMES R. RUDISILL,)

Petitioner,)

v.) No. 22-888

DENIS R. McDONOUGH, SECRETARY OF)

VETERANS AFFAIRS,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, November 8, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MISHA TSEYTLIN, ESQUIRE, Chicago, Illinois; on behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-888, Rudisill versus McDonough, the Secretary of Veterans Affairs.

Mr. Tseytlin.

ORAL ARGUMENT OF MISHA TSEYTLIN
ON BEHALF OF THE PETITIONER

MR. TSEYTLIN: Mr. Chief Justice, and may it please the Court:

In Section 3311 of the Post-9/11 GI Bill, Congress awarded veterans who served after the September 11th attacks with an entitlement to wartime benefits befitting their wartime service. In Section 3327 of the same Act, Congress created a generous benefits coordination regime wherein veterans who had earned peacetime Montgomery better -- benefits with post-9/11 service could trade the unused portion of those Montgomery benefits for Post-9/11 benefits.

My client has no interest in trading his Montgomery benefits for his Post-9/11 benefits, so he has no use for the three -- 3327

1 election regime. Rather, Petitioner is invoking
2 his statutory entitlement under 3311 to cash in
3 his second period of service for Post-9/11
4 benefits. That second period of service is only
5 eligible for Post-9/11 benefits. It's not
6 eligible for Montgomery benefits. So there's
7 nothing for my client to coordinate.

8 Now the VA concedes that my client
9 has, in fact, earned a statutory entitlement
10 under 3311 to cash in his second period of
11 service for wartime benefits. But he takes the
12 -- but the VA takes the position that Section
13 3327's "may elect" clause revoked that
14 entitlement until he uses up or exhausts the --
15 the Montgomery benefits he earned from his first
16 period of service.

17 But, with all respect, a "may elect"
18 clause is simply not -- not how Congress revokes
19 clear statutory entitlements and certainly not
20 in the Byzantine manner that the VA suggests.
21 Further, the exhaustion requirement that is a
22 linch -- the linchpin of the VA's interpretation
23 finds no ground in the statutory text and
24 produces absurd results, such as punishing
25 veterans with less wartime benefits for simply

1 having served the nation longer.

2 Finally, the VA's effort to turn a
3 regime plainly designed to help a category of
4 veterans into a punitive regime punishing
5 long-serving veterans has numerous contextual
6 problems, including making 3322's concurrent --
7 concurrent usage bar surplusage.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: You make it seem as
10 though the election mechanism doesn't play much
11 of a role in -- in determining whether or not
12 Petitioner is able to get the second set of
13 benefits under -- the 9/11 benefits. I thought
14 that the 33 -- what is it -- 3327 requires
15 election, but it also has limitations.

16 You also seem to agree in your brief
17 that you cannot -- you're limited by the
18 concurrent -- you could not have the 9/11
19 benefits and the Montgomery benefits
20 simultaneously, right?

21 MR. TSEYTLIN: That's correct, Your
22 Honor.

23 JUSTICE THOMAS: But you also -- you
24 -- you seem not to think that the coordination
25 provisions apply. So (a) applies, right?

1 MR. TSEYTLIN: Yeah. So 320 -- 332(a)
2 applies because it says "shall elect" --

3 JUSTICE THOMAS: Okay.

4 MR. TSEYTLIN: -- in that term.

5 JUSTICE THOMAS: But then you say (d)
6 doesn't apply.

7 MR. TSEYTLIN: So the (d) says -- (d)
8 says that coordination shall be governed. And
9 our submission is that we are not coordinating.
10 We're --

11 JUSTICE THOMAS: Well, so what are
12 you? I mean -- -

13 MR. TSEYTLIN: We're --

14 JUSTICE THOMAS: -- you have a second
15 set of benefits. I thought the whole point was
16 to have the benefits if you -- if you qualify
17 for two, it is coordinated.

18 MR. TSEYTLIN: No, Your Honor. We're
19 just using. And I think the -- my friends on
20 the other side say we would not be coordinating
21 if we first used our Montgomery benefits and
22 then -- exhausted our Montgomery benefits and
23 then thereafter used Post-9/11 benefits. I fail
24 to understand how simply using Post-9/11
25 benefits is coordination.

1 JUSTICE THOMAS: I know, but you admit
2 that you can't have them simultaneously. If you
3 -- if you say you qualify for them and you have
4 an -- a separate entitlement for them, then why
5 can't you use them concurrently?

6 MR. TSEYTLIN: Because 3322(a)
7 specifically says you can't use them
8 concurrently. That's the --

9 JUSTICE THOMAS: So then why aren't
10 you limited by 3322(d)?

11 MR. TSEYTLIN: Well, 3322(d) is not a
12 limitation. All it is is a cross-referenced
13 coordination provision. And my friend in the V
14 -- at the VA admit that that provision itself
15 doesn't act as a limitation.

16 Further, that provision can't possibly
17 do the work here. I mean, most of the -- most
18 of the sections listed as needing to be
19 coordinated under 3322(d) aren't even referenced
20 in 3327.

21 JUSTICE THOMAS: Let me ask --

22 MR. TSEYTLIN: So it can't be doing --

23 JUSTICE THOMAS: -- one final
24 question.

25 MR. TSEYTLIN: -- that kind of work.

1 JUSTICE THOMAS: You -- you say that
2 you are entitled to separate benefits. What if,
3 rather than Petitioner having separate tours in
4 the military, he had one continuous tour for a
5 decade or so? Would you still have the same
6 argument?

7 MR. TSEYTLIN: Absolutely the same
8 argument. And when I'm talking about separate
9 periods of service, I mean a period long enough
10 to qualify for Montgomery benefits, which --
11 which is two or three years, and if you have a
12 -- a period thereafter that's after 9/11, then
13 that gets you a 3311 entitlement.

14 JUSTICE JACKSON: Mr. Tseytlin, I've
15 come up with an analogy that I am using in my
16 own mind to think about your argument and the
17 way that you're looking at the statute, and I
18 hope you can tell me whether or not I'm right
19 about this.

20 All right. So the two benefit -- the
21 two benefits programs, the Montgomery program
22 and the Post-9/11 program, are like two
23 different color baseball caps that service
24 members can earn. The Montgomery benefits are a
25 red hat that a service member is entitled to

1 receive for a qualifying period of service, and
2 when they're ready, they can wear that hat for
3 up to 36 months to get a certain level of
4 education benefits.

5 The Post-9/11 benefits are a blue hat
6 that a qualifying service member is entitled to
7 receive, and they can wear that hat -- hat to
8 get a different level of benefits for up to 36
9 months.

10 The law says that the member can earn
11 more than one hat -- this is what you were just
12 talking about with -- with Justice Thomas -- for
13 separate periods of service, but the two hats
14 can't be worn at the same time.

15 MR. TSEYTLIN: That's correct.

16 JUSTICE JACKSON: You have to do one
17 or the other. And no matter how many hats the
18 member has, he can only wear the hats and
19 receive the corresponding benefits for a total
20 of 48 months. Is that so far so good?

21 MR. TSEYTLIN: Everything you said --

22 JUSTICE JACKSON: All right.

23 MR. TSEYTLIN: -- I agree with, Your
24 Honor.

25 JUSTICE JACKSON: So I think you're

1 arguing that Rudisill is entitled to and has
2 received both a red hat and a blue hat for the
3 separate periods of qualifying service that he
4 has. He had the red hat he earned under 3011 --
5 that's what you said at the beginning -- and the
6 blue hat he earns under 3311 for his second or
7 separate period of service.

8 And so, at this point, he's worn the
9 red hat for 25 months and 14 days and used those
10 benefits for his undergraduate degree, and now
11 what he'd like to do is pick up the blue hat and
12 wear that for up to the total 48-month cap.

13 MR. TSEYTLIN: Yes.

14 JUSTICE JACKSON: Is that what you're
15 saying?

16 MR. TSEYTLIN: Absolutely, Your Honor.

17 JUSTICE JACKSON: All right. So
18 there's no coordination. He's not exchanging --
19 I mean, it seems to me that the 3322(d) and 3327
20 scenario is like a different situation. It's
21 the service member who has a red hat during the
22 period of time in which he could qualify for a
23 blue hat and he needs an opportunity to exchange
24 it.

25 MR. TSEYTLIN: Absolutely. I agree

1 with everything you said, Your Honor. And I
2 think the fundamental problem with the VA --
3 what the VA has done here through this form and
4 now they've defended through the courts is what
5 you describe is exactly what Congress had in
6 mind.

7 And what the VA has attempted to do is
8 they're trying to export this regime which is
9 plainly designed for what you're talking about
10 to a completely different scenario which
11 Congress was not trying to deal with, and --

12 JUSTICE JACKSON: In that scenario,
13 the -- the scenario comes up, right, because we
14 have 9/11 happening in September of 2001, but
15 the effective date for being able to get a blue
16 hat doesn't happen until 2009.

17 So you have people who are serving in
18 that period of time who just have access to the
19 red hat scenario. They don't -- they're not
20 able to get the blue hat because it isn't
21 effective yet.

22 MR. TSEYTLIN: Yeah.

23 JUSTICE JACKSON: And if they want to
24 ultimately change over their red hat to the blue
25 hat, they have to have a mechanism to do it?

1 MR. TSEYTLIN: Absolutely right. And
2 it -- it's even more than that, Your Honor.
3 They didn't -- when they were serving and
4 crediting their service to Montgomery by making
5 those payments and, like my client, using up
6 those benefits, the Post-9/11 program didn't
7 even exist. They had no reason to know that
8 they should use -- that they should save this
9 period of service for -- for something else.

10 JUSTICE JACKSON: And 30 -- 3327(d)
11 and the limitations that -- that Justice Thomas
12 referenced are just making the common-sense
13 point that if you're a service member who has
14 worn the red hat for some period of time and
15 then you'd like to exchange it, you don't get,
16 with the new blue hat, a full 36-period --
17 month period. You just get the residual amount
18 of time that's left on that red hat period,
19 correct?

20 MR. TSEYTLIN: That's exactly right.
21 But it is also coordination because it's
22 actually the one-to-one exchange that is laid
23 out in -- in 3327(d) seems logical, but you
24 couldn't intuit that from the regime without the
25 3327(d) because the way that Montgomery benefits

1 are earned and the way that Post-9/11 benefits
2 are earned are quite different.

3 Montgomery benefits are earned
4 basically on a per-month basis, which is that
5 every additional month you serve in that
6 Montgomery period of service, you get an extra
7 month of Montgomery.

8 When -- and Post-9/11 doesn't work
9 like that at all. If you serve at least 90 days
10 post-9/11, you always get only 36 months. And
11 if you serve less than 36 months, then you just
12 get --

13 JUSTICE KAVANAUGH: Can I --

14 MR. TSEYTLIN: -- less benefits per
15 month.

16 JUSTICE KAVANAUGH: -- can I take you
17 back to the text of the statute?

18 MR. TSEYTLIN: Yes.

19 JUSTICE KAVANAUGH: Because the way I
20 saw the Federal Circuit analyzing this was that
21 3322 -- let's start with that -- deals with a
22 situation when you're entitled to benefits under
23 both programs. Is that correct so far?

24 MR. TSEYTLIN: Yes. The -- the -- the
25 overall regime is a bar on duplication, and then

1 3322(a) is -- prohibits one type of duplication.

2 JUSTICE KAVANAUGH: And then 3322(d),
3 I think we've got to focus really carefully on
4 the exact text.

5 MR. TSEYTLIN: Mm-hmm.

6 JUSTICE KAVANAUGH: It doesn't just
7 say coordination of benefits. You've been
8 really emphasizing a difference between
9 entitlement and benefits. It says coordination
10 of entitlement --

11 MR. TSEYTLIN: Mm-hmm.

12 JUSTICE KAVANAUGH: -- to educational
13 assistance under this chapter on the one hand
14 and such chapters or provisions on the other,
15 namely, Montgomery and Post-9/11, shall,
16 coordination of entitlements shall be governed
17 by the provisions of 3327.

18 MR. TSEYTLIN: That -- that's right --

19 JUSTICE KAVANAUGH: So --

20 MR. TSEYTLIN: -- Your Honor, but it
21 doesn't say that you shall coordinate. It says,
22 if you -- it says, if you want to coordinate,
23 then look at 3327.

24 JUSTICE KAVANAUGH: It says
25 coordination of the entitlement.

1 MR. TSEYTLIN: Right. But, if you
2 don't want to coordinate your entitlement, you
3 just want to use your entitlement. And my
4 friend would concede that if we just did --

5 JUSTICE KAVANAUGH: Well, I don't
6 think you can -- because there's a -- a bar on
7 using both simultaneously, there has to be some
8 coordination, is what the statute says,
9 coordination of entitlement shall be governed.

10 MR. TSEYTLIN: Well, that's certainly
11 not my friend's position. They say that if we
12 first used our Montgomery benefits and then --
13 for 36 months and then used our Post-9/11
14 benefit --

15 JUSTICE KAVANAUGH: Because, at that
16 point --

17 MR. TSEYTLIN: -- that wouldn't be
18 coordinated.

19 JUSTICE KAVANAUGH: -- once you've
20 used up your Montgomery benefits, they're
21 totally used up, there's nothing to coordinate
22 at that point?

23 MR. TSEYTLIN: But wouldn't you be
24 coordinating at the first step because, at that
25 point, you would have been using -- you would

1 have been using when you have two benefits. But
2 I --

3 JUSTICE KAVANAUGH: They --

4 MR. TSEYTLIN: -- I also think that --

5 JUSTICE KAVANAUGH: -- they say that
6 -- so they say you're funneled then into 3327 as
7 necessarily and that if you get into 3327 and
8 you still have some Montgomery benefits that are
9 unused, you are bound by 3327(d)(2)(A) then.

10 MR. TSEYTLIN: Well, what they say is
11 that the coordination provision is just
12 suggestive. It just points you to 3327, and
13 then you have to decide what 3327 means. And I
14 think that must be right because it's just a
15 cross-reference.

16 And it also -- it just -- 3327 -- so
17 3322(d) can't be doing that much work in any
18 event. I mean, as I mentioned earlier, most of
19 the provisions mentioned -- and I urge Your
20 Honors to take a look at 3322(d) -- most of
21 those provisions stating --

22 JUSTICE KAVANAUGH: Yeah. No, I -- I
23 looked at it.

24 MR. TSEYTLIN: -- to coordinate it
25 aren't even mentioned in 3327, so at most, it's

1 a suggestive cross-reference. And then, when
2 you get to 3327, if you think the
3 cross-reference takes you there, all you have is
4 a "may elect" clause. And the superstructure of
5 the statute then is you have a clear,
6 unambiguous, plain-as-day entitlement under
7 3311.

8 So the question for the Court is
9 whether a "may elect" clause, which is, at best,
10 an oblique way to say something --

11 JUSTICE KAVANAUGH: Well, the point is
12 I think you have Montgomery. You're pointed --
13 you have entitlement to Montgomery. You have
14 entitlement to Post-9/11. You're pointed to
15 3327 by 3322(d). Stay with me so far. I know
16 you disagree with that.

17 MR. TSEYTLIN: That's fine.

18 JUSTICE KAVANAUGH: But, when you get
19 to 3327, then you can elect to go Post-9/11, or
20 you could stick just with your Montgomery.

21 MR. TSEYTLIN: With --

22 JUSTICE KAVANAUGH: Those are your two
23 options.

24 MR. TSEYTLIN: -- with respect,
25 nothing in 3327 says that second thing. What it

1 says is you may elect. And then it doesn't say
2 any penalty for declining to elect.

3 So what happens when you have a
4 plain-as-day statutory entitlement under 3311,
5 plain-as-day, but then you don't make an
6 election under 3327, they must be saying that
7 the "may elect" clause is an implicit revocation
8 of your 3311 entitlement.

9 And I would respectfully suggest that
10 is just not a linguistically possible and
11 certainly not -- not a natural way to revoke an
12 entitlement.

13 If you look at 33 --

14 JUSTICE KAVANAUGH: It's not a
15 revocation of your entitlement. After you use
16 up your Montgomery, the thing that caps you is
17 the -- is the 48-month limit.

18 MR. TSEYTLIN: Right. And so what --
19 what 33 --

20 JUSTICE KAVANAUGH: Correct? So you
21 still can get your Post-9/11 after using up
22 Montgomery.

23 MR. TSEYTLIN: What 3311 and 3312,
24 which is the sister provision, say is that the
25 entitlement in 3311 is subject to the 48

1 entitle -- 48-month entitlement. It does not
2 say that that entitlement is subject to making a
3 3327 election. And I urge Your Honors to look
4 at 3312 for that.

5 And so, again, the structure of our
6 argument is as follows: If you have a
7 plain-as-day statutory entitlement under 3311
8 and you have a voluntary "may elect" clause, it
9 is just not a natural or sensible reading of a
10 "may elect" clause, which doesn't impose a
11 penalty for declining to elect, to say that that
12 implicitly revokes a plain-as-day entitlement.

13 CHIEF JUSTICE ROBERTS: It may make --

14 JUSTICE KAVANAUGH: One -- one --

15 CHIEF JUSTICE ROBERTS: I'm sorry?

16 I was just going to say it may make
17 some sense into -- in what they probably
18 envisioned was the normal situation, where you
19 had the overlapping benefits on the basis of
20 continuous service. But I'm not sure it makes
21 much sense in the situation that you have, where
22 the benefits are earned because of separate
23 periods of service.

24 MR. TSEYTLIN: Because it --

25 CHIEF JUSTICE ROBERTS: In that

1 situation, I -- I -- I suppose you're saying
2 you've got two completely distinct benefits and
3 you can choose whichever one -- you've earned
4 both of them. You can choose which one you want
5 to collect benefits under.

6 MR. TSEYTLIN: Absolutely, Your Honor.
7 It makes absolutely no sense. The -- the
8 exhaustion requirement that Justice Kavanaugh
9 was talking about is as absurd a requirement as
10 you could ever imagine a statutory -- in a
11 statutory scheme dealing with veterans.

12 Think about it. When my -- when my
13 client came to the VA and said I want to have
14 about 23 months of Post-9/11 benefits, they said
15 you can't have that because you still have a
16 bunch of Montgomery bene- -- you have basically
17 10 months of Montgomery benefits left over.

18 JUSTICE KAVANAUGH: Which is what --

19 MR. TSEYTLIN: But --

20 JUSTICE KAVANAUGH: -- the statute
21 says in 3327.

22 MR. TSEYTLIN: -- what -- but what --

23 JUSTICE JACKSON: Except I don't see
24 an exhaustion clause in 3327.

25 JUSTICE KAVANAUGH: Yeah.

1 MR. TSEYTLIN: Right. But what if my
2 client had served shorter in that first period
3 of service, Your Honor? What if he had served
4 and had gotten a hardship discharge such that
5 he'd only earned 25 months of Montgomery, so he
6 gave less time to the nation?

7 Under the VA's position, we would
8 be -- my client would be entitled to the whole
9 23 months of Post-9/11 benefits. It is hard to
10 imagine a regime more absurd than that than a
11 veteran --

12 JUSTICE KAVANAUGH: Well, I guess --

13 MR. TSEYTLIN: -- gets less benefits
14 for serving more.

15 JUSTICE KAVANAUGH: -- let's -- on the
16 absurdity, the -- the -- the Congress
17 establishes a generous -- more generous new
18 program that you can switch into, but it's not
19 infinitely generous in the sense that you get
20 more monthly benefits, but if you had unused
21 Montgomery, that you get more in monthly
22 benefits under the Post-9/11, but if you had
23 unused Montgomery, you can only use the
24 Post-9/11 up to the 36 months that you had --

25 MR. TSEYTLIN: But --

1 JUSTICE KAVANAUGH: -- originally.

2 MR. TSEYTLIN: -- but, Your Honor, I
3 mean, that's just assuming you're always goings
4 to have 36 months of Montgomery. It's possible
5 to have 25 months of Montgomery. And the way
6 their statutory regime works is, if you have
7 less months of Montgomery because you serve
8 less, you got a hardship discharge or whatever,
9 you suddenly are entitled to more wartime
10 benefits.

11 And so it is a punitive penalty for
12 giving more time to the nation. That -- I mean,
13 it's hard to imagine a regime serving veterans
14 trying to encourage longer service --

15 JUSTICE KAVANAUGH: No, I -- I don't
16 think I agree with penalty. But let me ask one
17 question.

18 If we conclude that 3327 is the
19 exclusive way for someone entitled to Montgomery
20 to switch over to Post-9/11 benefits, okay, so I
21 know you disagree with that, but if we conclude
22 that 3327's exclusive, do you then lose?

23 MR. TSEYTLIN: I mean -- I mean, that
24 assumes the -- the entire argument away.

25 JUSTICE KAVANAUGH: Exactly. I -- I'm

1 just making sure.

2 MR. TSEYTLIN: That -- that assumes --

3 JUSTICE KAVANAUGH: Okay. I

4 understand that.

5 MR. TSEYTLIN: -- that a 3327 election

6 is the only way that one can invoke their

7 statutory entitlement in 3311, and absolutely

8 nothing in the statute says that.

9 JUSTICE JACKSON: I mean, there seems

10 to be an assumption that -- that you would have

11 to switch in order to be able to get the 3311

12 benefits that you were separately entitled to

13 because of your separate period of service.

14 That's the part where I'm getting lost

15 in the conversation that you had with Justice

16 Kavanaugh. It seems to me, as I said at the

17 original -- at the outset, that if you have two

18 separate periods of service, you are entitled to

19 two separate benefit packages. Isn't that

20 historically the way it was in the GI Bill?

21 MR. TSEYTLIN: Absolutely, Your Honor.

22 And --

23 JUSTICE JACKSON: All right. And

24 there was no historical circumstance that would,

25 absent any specific language, say that you had

1 to complete entirely all of one before you
2 decided to invoke the other. They were
3 entitlements that you had because of your
4 service.

5 MR. TSEYTLIN: Absolutely right. And
6 no -- it has never done that before. It
7 wouldn't make any sense to. Why would Congress
8 be enacting a regime where the -- wherein the
9 statutory findings say those Montgomery
10 benefits, they're outmoded, we want to reward
11 wartime service with wartime benefits, and then,
12 through these implications through a vague
13 cross-reference to a coordination clause, say
14 that no, no, what we really meant, in a bait and
15 switch, is you've got to use up all 36 months of
16 those benefits that we just said in our
17 statutory findings are outmoded before you can
18 get to the benefits that we're really enacting
19 this bill to -- to -- to --

20 JUSTICE KAGAN: Mr. Tseytlin --

21 JUSTICE ALITO: Counsel --

22 JUSTICE KAGAN: -- is your argument
23 dependent on the idea that you're not
24 coordinating entitlement?

25 MR. TSEYTLIN: It -- it is not

1 dependent on that. All the coordination clause
2 is is a cross-reference to 3327. Our
3 superstructure of our argument is, as I've said
4 a couple times, is that you have a plain-as-day
5 entitlement under 3311 --

6 JUSTICE KAGAN: Well, I know that you
7 have a plain-as-day entitlement in 3311, but if
8 you're coordinating entitlement, I -- I mean, I
9 guess, you -- you -- you know, at certain
10 points, I took you to be saying, well, we're
11 just not coordinating entitlement, but if you
12 are coordinating entitlement, shall be governed
13 by 3327, 3327 doesn't make the kind of
14 distinction that you're making between veterans
15 with one period of service and veterans with
16 multiple periods of service.

17 So how do you get out of that if
18 not by saying what I took you to be saying at
19 some points but I didn't realize -- I didn't
20 take this from your brief, that you're not
21 coordinating entitlement?

22 MR. TSEYTLIN: We are absolutely not
23 coordinating entitlement. We're just using 30
24 --

25 JUSTICE KAGAN: Okay. So your

1 argument does depend on that, the idea that
2 you're not coordinating entitlement?

3 MR. TSEYTLIN: I do not believe that
4 either side of this case has said that 3322(d)
5 resolves this case. Certainly, if we win on the
6 coordination, we win the case. But, even if
7 Your Honors think that we lose on coordination,
8 it's still the case that a "may elect" clause is
9 not a natural or linguistically, I say, possible
10 way to revoke a statutory entitlement.

11 JUSTICE KAGAN: I see. So you're
12 saying that even if 3322 does direct people in
13 your client's position to 3327, you still win
14 because this is not a mandatory provision?

15 MR. TSEYTLIN: Yeah, and because it
16 doesn't say it's revoking an entitlement. And I
17 also think that --

18 JUSTICE GORSUCH: How does that
19 compare with other statutory provisions where
20 Congress did use "shall elect"? And I think
21 they did that in 3322(a) elsewhere and 3033(a).

22 MR. TSEYTLIN: Yeah, I mean, I think
23 the difference between "shall" and "may" is --
24 is critical here. I mean, it's telling the
25 veteran that you don't have to elect, and it's

1 not giving any penalty for not electing.

2 JUSTICE GORSUCH: What do you do in
3 your interpretation with the fact the statute in
4 both places references as of August 1st, 2009, I
5 think?

6 MR. TSEYTLIN: Well, I think ourselves
7 and the VA agree that that's just the effective
8 date. It wouldn't --

9 JUSTICE GORSUCH: Is that the
10 effective date, or does that suggest something
11 about what's being coordinated here, a single
12 period of service?

13 MR. TSEYTLIN: Certainly, it could be
14 suggestive of that. You know, in thinking
15 through that interpretation, it does lead to
16 some weird outcomes that are hard to -- hard to
17 think Congress was intending to do, but,
18 certainly, if Your Honors read it that way --

19 JUSTICE GORSUCH: Well, it just seems
20 to me awkward that we would read that out of the
21 statute altogether rather than perhaps as a clue
22 that what Congress was up to was trying to deal
23 with, as Justice Jackson said, those members
24 who, as of that effective date, had some
25 preexisting Montgomery benefits that they

1 wished, that they chose to elect, may elect, to
2 turn into 9/11 benefits.

3 MR. TSEYTLIN: Certainly, that reading
4 would benefit my client. It is -- it is -- it
5 is --

6 (Laughter.)

7 MR. TSEYTLIN: And it is a very
8 sensible reading of the statute. I would be
9 worried --

10 JUSTICE GORSUCH: Well, of course, it
11 is.

12 (Laughter.)

13 MR. TSEYTLIN: No, but I would be
14 worried -- I would be -- I would caution the
15 Court if the Court is going to rule for us
16 invoking that rationale because it would have
17 unfortunate collateral consequences for veterans
18 who had those two periods of service after the
19 effective date of the Post-9/11 --

20 JUSTICE KAVANAUGH: That would be --
21 that would be --

22 JUSTICE GORSUCH: I -- I understand
23 that, but --

24 MR. TSEYTLIN: -- that -- that would
25 put them in quite a tough place.

1 JUSTICE KAVANAUGH: That would create
2 negative consequences for a lot of people.

3 JUSTICE GORSUCH: I -- I understand
4 that.

5 MR. TSEYTLIN: It would -- that --
6 that particular --

7 JUSTICE GORSUCH: My -- my --

8 MR. TSEYTLIN: -- reading would
9 because of -- because then people would have to
10 -- have to guess --

11 JUSTICE KAVANAUGH: Yeah.

12 JUSTICE GORSUCH: Just one further --

13 MR. TSEYTLIN: -- whether they got --

14 JUSTICE GORSUCH: -- one further
15 question. There's some debate between the two
16 of you about what -- what has happened in the
17 past when there's overlapping periods of
18 service, two -- two benefits available.

19 Can you speak to that?

20 MR. TSEYTLIN: Yeah. I mean, the way
21 that the -- the -- the GI Bills have always
22 worked is, when you have two periods of service,
23 you can't use them at the same time, but you can
24 credit the same period of service -- you can
25 credit a single period of service to two types

1 of benefits.

2 I mean, the clearest way to see that
3 with regard to the provisions here is -- is the
4 Montgomery -- the traditional Montgomery program
5 and the Montgomery Selected Reserves program.
6 Under 3033(c), you can't get credit -- you can't
7 get the Selected Reserves benefits and the
8 traditional Montgomery benefits for the same
9 period of service. So that is a prohibition
10 against drawing upon a single period of service.

11 JUSTICE GORSUCH: Any exhaustion
12 requirements previously in history?

13 MR. TSEYTLIN: No, no, and none in --
14 none in -- in this provision either. It's
15 entirely a figment of -- of the VA's imagination
16 I would respectfully submit.

17 JUSTICE ALITO: Is there -- this is --
18 is there a statutory provision that specifies
19 when the election under 3327(a) must be made?

20 MR. TSEYTLIN: Well, there -- there --
21 there is not, but, you know, our position is
22 that if somebody has credited their period of
23 service -- their -- their period of service to
24 Montgomery and they want to cash -- cash in that
25 same period of service for Post-9/11, so then,

1 when they want to cash in the -- the remaining
2 Montgomery credits for the more generous
3 life-changing Post-9/11 credits, then they need
4 to make that election.

5 JUSTICE ALITO: Does the government
6 disagree with you on that point as to timing?

7 MR. TSEYTLIN: My understanding is the
8 government doesn't disagree with us on any way
9 how the statutory regime works for somebody that
10 -- for whom it was naturally designed, for
11 someone who wants to trade their Montgomery for
12 Post-9/11 benefits. It also doesn't disagree
13 with us on how the statutory regime works for
14 someone that's used up all their Montgomery
15 benefits and just wants to draw on --

16 JUSTICE ALITO: Would the --

17 MR. TSEYTLIN: -- 12 months of
18 Post-9/11.

19 JUSTICE ALITO: -- would the statute
20 preclude the Secretary from saying that the
21 election under 3327(a) must be made at a
22 particular point in time? Because, if you elect
23 -- an individual may elect to receive Post-9/11
24 benefits. If the individual elects not to
25 receive those benefits, that would be

1 irrevocable, right?

2 MR. TSEYTLIN: Certainly, that --
3 declining to make the election is not some --

4 JUSTICE ALITO: I thought there's a
5 provision that says it's irrevocable.

6 MR. TSEYTLIN: Yes. When you make the
7 election, you can't -- you can't unwind it. And
8 our --

9 JUSTICE ALITO: Well, if it says you
10 have to make the election one way or the other,
11 then you can't -- if you elect not to get the
12 9/11 benefits, then you can't get the 9/11
13 benefits if it's irrevocable.

14 MR. TSEYTLIN: That's certainly not
15 our position, Your Honor. Our position is not
16 --

17 JUSTICE ALITO: I -- I know it's not
18 your position, but why is that wrong?

19 MR. TSEYTLIN: Because the -- the --
20 -- the -- the provision that says that the
21 election under (a) is irrevocable, I think, in
22 both sections of that, it's only irrevocable if
23 you make the affirmative election. If you don't
24 make an election, I don't think the VA -- and
25 maybe my friend will correct me -- treats that

1 as making any sort of election under 3327, but I
2 could be wrong as to their position.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. Just a couple questions to clarify my
5 own understanding.

6 Did I understand you to say that your
7 position, your analysis of the statute and the
8 consequence would be the same with respect to
9 somebody who had no break in service? It was
10 all continuous service? Or would it be --

11 MR. TSEYTLIN: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: -- or would it
13 be different?

14 MR. TSEYTLIN: It would be the same.

15 CHIEF JUSTICE ROBERTS: Okay. Thank
16 you.

17 Justice Thomas?

18 Justice Alito?

19 Justice Sotomayor?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: Just on the "may
23 elect" so I understand, when you get to a
24 educational institution and you have some unused
25 Montgomery and you're also entitled to

1 Post-9/11, you presumably have to fill out a
2 form to tell the educational institution which
3 you're using, correct?

4 MR. TSEYTLIN: No. What you do is you
5 fill out a form with the VA. And in -- in our
6 -- in our circumstance, our client filled out a
7 form that invoked only his second Post-9/11
8 eligible only period of service. Then the VA
9 will issue you a certificate of eligibility, and
10 you take that into the --

11 JUSTICE KAVANAUGH: Does the form have
12 a choice between, okay, I'm showing up for
13 graduate school, I'm going to use either
14 Montgomery or Post-9/11 or other boxes
15 potentially?

16 MR. TSEYTLIN: Yeah. I mean, my -- my
17 client filled it out online, and you've got to
18 select which -- which benefits.

19 JUSTICE KAVANAUGH: Is one of the
20 boxes to select Montgomery?

21 MR. TSEYTLIN: Yes.

22 JUSTICE KAVANAUGH: So you may elect
23 Montgomery?

24 MR. TSEYTLIN: Yeah, and that would be
25 an election under 3322, which you have -- (a),

1 which you have to make so that -- pursuant to
2 the concurrent usage bar.

3 JUSTICE KAVANAUGH: Because, if you're
4 going to claim veteran benefits, you're going to
5 have to elect one or the other --

6 MR. TSEYTLIN: Yeah. Under --

7 JUSTICE KAVANAUGH: -- to get the
8 school -- to get the benefits for the
9 educational institution?

10 MR. TSEYTLIN: Right, and that
11 election is mandatory under 3322(a). The 3327
12 election is not -- (a) is not mandatory.

13 JUSTICE KAVANAUGH: Mm-hmm. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: I just have a
18 clarifying question. You pointed out that no
19 prior GI Bills have worked this way. Did any of
20 the prior GI Bills deal with overlapping periods
21 of entitlement --

22 MR. TSEYTLIN: Well, certainly --

23 JUSTICE BARRETT: -- as this one does?

24 MR. TSEYTLIN: -- the -- the -- the
25 Montgomery traditional and the Montgomery Select

1 Reserve overlap, which is why you had 3033(c)
2 that -- and nothing -- there was no exhaustion
3 requirement or anything like that.

4 There's also not GI Bills, but pre --
5 pre the original World War II era GI Bill there
6 were benefits that -- that could be earned
7 during the same period of service that then made
8 you eligible for the more generous -- for
9 original GI Bill benefits, and there was no
10 exhaustion requirement there, no --

11 JUSTICE BARRETT: But this particular
12 situation where you have, you know, these two,
13 like the Montgomery and the Post-9/11, where you
14 have an entitlement, your client's situation,
15 are you saying that it arose before on this
16 other Montgomery --

17 MR. TSEYTLIN: It -- it did not. But
18 --

19 JUSTICE BARRETT: -- or is this a new
20 --

21 MR. TSEYTLIN: -- but I would also say
22 that my client's first period of service largely
23 was before the -- the -- the period after 9/11,
24 and a lot of folks who are governed by their
25 regime are --

1 JUSTICE BARRETT: Well, I -- I was
2 just asking about the history of the way the
3 prior GI Bills worked. As you pointed out, it
4 would be unusual for this one given that
5 Congress didn't have this exhaust and forfeit
6 requirement in the other regime. So I was just
7 wondering how analogous this was, but I think
8 you answered that.

9 MR. TSEYTLIN: For the main GI Bills,
10 they're not overlapping, but for the subsidiary
11 Reserve ones and other programs, certainly,
12 there are overlapping. And there's never been a
13 requirement that you use up the -- the meager
14 benefits to get the good benefits.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: Yes. There were a
18 couple of questions about coordination, and I
19 thought the point of coordination was the swap.
20 And I think that the -- the text sort of bears
21 that out because, if you look at 3322(d), you're
22 beginning with a person who has Montgomery
23 benefits or some other types of benefits.

24 And it's as of August 1st, and I think
25 take Justice Gorsuch's point that that might be

1 relevant to identifying the people in this
2 particular situation. Coordination of
3 entitlement to assistance under this chapter,
4 meaning the Post benefits -- Post-9/11 benefits,
5 takes place under 32 -- 3322 -- or, sorry, 3327.

6 And as you say, when you get there,
7 you may elect. But I thought the sort of
8 critical part was 3327(d)(1), which is where the
9 swap is effected.

10 MR. TSEYTLIN: Mm-hmm.

11 JUSTICE JACKSON: You -- you -- if
12 you're making an election under subsection (a),
13 you shall be entitled to the Post-9/11 benefits
14 instead of the benefits that you would have
15 received in Montgomery.

16 So the reason why you're coordinating,
17 I thought, under the way the -- the statute
18 reads is to effect the swap of the unused
19 Montgomery benefits.

20 MR. TSEYTLIN: That's -- that's
21 obviously what 3327 is designed to do. Every
22 textual indicia in 3327 is a trade-in regime.
23 The -- the entire argument my friend's come
24 up -- come up with is -- is fitting a square peg
25 into a round hole or vice versa. It's a --

1 JUSTICE JACKSON: Because you don't
2 need this to get your entitlement to the
3 Post-9/11 benefits because you had those already
4 at 3311.

5 MR. TSEYTLIN: Exactly right.

6 JUSTICE JACKSON: You're only
7 coordinating to make a swap, right?

8 MR. TSEYTLIN: Exactly right, Your
9 Honor.

10 JUSTICE JACKSON: All right.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Suri.

14 ORAL ARGUMENT OF VIVEK SURI
15 ON BEHALF OF THE RESPONDENT

16 MR. SURI: Mr. Chief Justice, and may
17 it please the Court:

18 I think the crucial question in this
19 case is whether Mr. Rudisill was required to
20 elect Post-9/11 benefits in order to receive
21 them. So I'd like to begin by discussing who
22 does and doesn't have to make an election in
23 order to receive Post-9/11 benefits.

24 A person who's entitled to benefits
25 under only one program doesn't need to make an

1 election. He can just apply for the benefits
2 and receive those benefits. An election is a
3 choice between multiple programs. And if you're
4 covered only by one program, there's no choice
5 that needs to be made.

6 A person who is covered by two
7 programs or more, however, does need to make an
8 election. This is explicit in the text of
9 Section 3322(a), which is on page 1A of our
10 brief. I'll read the relevant portion aloud.

11 "An individual entitled to educational
12 assistance under this chapter" -- that's
13 Post-9/11 -- "who is also eligible for
14 educational assistance under Chapter 30" --
15 that's Montgomery -- then it goes on, "shall
16 elect under which chapter or provisions to
17 receive educational assistance."

18 In other words, if you're eligible for
19 both Montgomery and Post-9/11 benefits, you must
20 make a choice. You can elect Post-9/11
21 benefits, or you can elect Montgomery benefits.
22 And if you elect Post-9/11 benefits, that
23 election would be made under 3327, triggering
24 all the consequences that 3327 specifies.

25 3322(d) reinforces that command. It

1 states that entitlement must be -- shall be
2 governed, coordination of entitlement shall be
3 governed by 3327, and that makes it quite clear
4 what 3327 is doing.

5 It means that if you're eligible for
6 both Montgomery benefits and Post-9/11 benefits,
7 3327 is the provision you go to to combine those
8 two programs. And that's consistent with how
9 the Federal Circuit applied this provision, and,
10 therefore, its judgment should be affirmed.

11 JUSTICE THOMAS: Where do you
12 statutorily peg the exhaustion requirement?

13 MR. SURI: The exhaustion requirement
14 arises from the fact that someone who is covered
15 by only one program doesn't need to make an
16 election in the first place. So it is a
17 consequence of 3322(a) and 3322(d).

18 Someone who has exhausted his
19 Montgomery benefits and has only Post-9/11
20 benefits remaining is covered by only one
21 program and, therefore, wouldn't need to make an
22 election in the first place.

23 JUSTICE JACKSON: Mr. Suri, I don't
24 understand your reading of 3322(a). I mean, it
25 seems that your argument is turning on the

1 supposition and the proposition that a person
2 who has two separate periods of service and is
3 entitled under the statute -- and I assume you
4 don't quibble with the entitlement to the
5 Post-9/11 benefits under 3311, right? So he's
6 entitled to both Montgomery and -- and
7 Post-9/11.

8 You say but he has to choose, as
9 though he's not allowed to cash in or take
10 advantage of both. So, first of all, is -- is
11 that reading coming from 3322(a) as you've said?

12 MR. SURI: Yes.

13 JUSTICE JACKSON: All right. But I
14 didn't hear you necessarily to read the entire
15 section, which seems to me to cast a different
16 light. When you say "an individual is entitled
17 to educational assistance under this chapter" --
18 this is the beginning of 3322(a) -- it goes on
19 to say, "may not receive assistance under two or
20 more such programs concurrently" --

21 MR. SURI: Mm-hmm.

22 JUSTICE JACKSON: -- comma, "but shall
23 elect in such form as the Secretary under which
24 chapters to receive addition" -- "educational
25 assistance."

1 It seems to me the prior reference to
2 "concurrently" is doing a substantial amount of
3 work to explain that you can't get them at the
4 same time, but you'll need to elect which one
5 you want to get at which time. That is
6 different than suggesting, I think, that you
7 have to choose between them such that you can
8 only have one ever.

9 MR. SURI: I agree with everything you
10 said --

11 JUSTICE JACKSON: Great.

12 MR. SURI: -- Justice Jackson. But
13 3327 is the mechanism by which you elect, if
14 you're eligible to vote, that you now want to
15 receive Post-9/11 benefits.

16 And we can look at the text of these
17 two provisions to see why that's so. If you
18 look at the last words of 3322(a), it says that
19 you shall elect under which chapter to receive
20 educational assistance. This is page 1A of our
21 brief.

22 And then page 4A of our brief, 3327(a)
23 states an individual may elect to receive
24 educational assistance under this chapter.

25 So there's an exact parallelism.

1 3322(a) says you shall --

2 JUSTICE GORSUCH: There's a sort of
3 parallelism, I'll grant you, but, as Justice
4 Jackson pointed out, (a) on 3322 is about
5 concurrent. You can't have concurrent. That's
6 always been the law. No surprise Congress wants
7 that to be the case here.

8 Shall elect. In other circumstances,
9 Congress has used "shall elect" as well,
10 3033(a), I believe.

11 Here, when we get to -- when you --
12 and -- and I think you agree in your brief that
13 3322 doesn't resolve the question presented
14 before us, right?

15 MR. SURI: The question presented has
16 to be resolved by looking at both provisions
17 together, not by one or the other alone. That's
18 right.

19 JUSTICE GORSUCH: Yeah, I -- I think
20 you said as much on --

21 MR. SURI: Yes, we do.

22 JUSTICE GORSUCH: -- page 14 of your
23 brief. The coordination clause does not resolve
24 the specific question presented, right?

25 MR. SURI: Points to 3327.

1 JUSTICE GORSUCH: Okay. So we've to
2 go to 3327. When we get there, we don't have a
3 "shall," we have a "may."

4 MR. SURI: Absolutely. "May" implies
5 --

6 JUSTICE GORSUCH: So the parallelism
7 is sort of parallel but not quite parallel.

8 MR. SURI: "May" implies that you have
9 multiple options. You can opt to elect
10 Post-9/11 benefits, or you can opt to elect
11 Montgomery benefits.

12 JUSTICE GORSUCH: Doesn't it also
13 possibly imply that you don't have to elect at
14 all?

15 MR. SURI: No, because 3322(a) says
16 you shall elect.

17 JUSTICE GORSUCH: Well, it says shall
18 elect with respect to concurrent benefits. It
19 doesn't speak to benefits otherwise.

20 MR. SURI: But --

21 JUSTICE GORSUCH: Right? (a) is about
22 concurrent benefits?

23 MR. SURI: No. (a) has --

24 JUSTICE GORSUCH: 3322(a) is about
25 concurrent benefits.

1 MR. SURI: (a) has two distinct
2 requirements. It first says may not receive
3 assistance under two or more such programs
4 concurrently. And then it also says --

5 JUSTICE GORSUCH: No, no.

6 MR. SURI: -- shall --

7 JUSTICE GORSUCH: It doesn't say also.
8 It doesn't and also say. It says "but shall."

9 MR. SURI: Yes.

10 JUSTICE GORSUCH: Okay? So, instead
11 of concurrent, you have to pick one. I get
12 that. Suppose I'm right about that. Just spot
13 me that, all right?

14 MR. SURI: Very well.

15 JUSTICE GORSUCH: I've got a "shall"
16 here. I've got a "shall" in 30 -- 3033(a),
17 which is again about coordinating between two
18 different programs. But, when I get to 3327, I
19 have a "may."

20 So why isn't it an option to a veteran
21 simply not to elect at all?

22 MR. SURI: The reason that doesn't
23 work --

24 JUSTICE GORSUCH: "May" usually means
25 "may," doesn't it?

1 MR. SURI: I agree that "may" means
2 "may."

3 JUSTICE GORSUCH: And "may" -- "may"
4 implies normally that you don't have an
5 obligation to do anything, right?

6 MR. SURI: And it implies that here.

7 JUSTICE GORSUCH: Right?

8 MR. SURI: I'm entirely agreeing --

9 JUSTICE GORSUCH: No, it -- it -- it
10 --

11 MR. SURI: -- with your reading of
12 "may" in this provision. I'm just suggesting
13 that the alternative to electing Post-9/11
14 benefits under this provision is not, as
15 Petitioner suggests, not electing them but
16 receiving them anyway.

17 The alternative is electing Montgomery
18 benefits or continuing with Montgomery benefits,
19 and that's the most natural way to read (a)
20 itself.

21 CHIEF JUSTICE ROBERTS: Well, I mean,
22 just to follow up on Justice Gorsuch's point,
23 the most natural way to read "may" is "may."
24 And that's very much compelled if a couple
25 sections earlier you have the phrase "shall

1 elect," which suggests that that's quite a
2 different -- you don't have a choice there, but
3 when they say "may elect," you do have a choice.

4 MR. SURI: I agree, Mr. Chief Justice.
5 And I would reconcile the two provisions in the
6 following way: The first provision, 3322(a),
7 says you must make a choice. You must choose
8 either Montgomery or Post-9/11. And then
9 3327(a) says you may elect Post-9/11.

10 Now that means the other choice that
11 you have is you may elect Montgomery. It
12 doesn't mean that the other choice you have is
13 receive Post-9/11 anyway without choosing it.

14 JUSTICE KAVANAUGH: So you can't --

15 CHIEF JUSTICE ROBERTS: Well, am I --
16 I know there must be something wrong with the
17 way -- at least on -- on this point, because it
18 doesn't make any sense, but the reason that the
19 Petitioner here has this particular difficulty
20 is that he served an additional tour of duty
21 after 9/11 in addition to what he had served
22 before 9/11.

23 Now, if you have somebody who just
24 joined up after 9/11 for the same period as the
25 Petitioner served, the Petitioner is getting

1 less -- fewer benefits than the person who only
2 served one tour of duty for the same length
3 because, if he served just the -- the Post-9/11
4 for, whatever, three years, he would get three
5 years.

6 But, because this Petitioner had
7 served additionally beyond his period of
8 Post-9/11, he gets -- he doesn't get the full
9 benefit of the Post-9/11 benefits. So there
10 must be something wrong there because that would
11 -- that would not make any sense.

12 MR. SURI: The reason Petitioner isn't
13 getting as much -- as many months of benefits as
14 the other veteran in your hypothetical is not
15 that he is being penalized for serving two tours
16 of duty. The reason is he has already used 25
17 months of benefits, a different type of
18 benefits, I grant.

19 CHIEF JUSTICE ROBERTS: The Montgomery
20 benefits?

21 MR. SURI: The Montgomery benefits,
22 but a program that is designed to do a similar
23 thing to the Post-9/11 program.

24 CHIEF JUSTICE ROBERTS: Well, but that
25 still doesn't make all that much sense because

1 he's getting those other benefits because he had
2 an additional -- a couple additional tours of
3 duty. So maybe, you know, he's entitled to both
4 of them, but because of this other provision
5 there, he can't get both at the same time, but
6 it seems to me to be a pretty raw deal to say
7 you're going to lose -- you're entitled -- if
8 you hadn't done anything other than the 9/11,
9 you would be entitled to this, but because you
10 served additional period of time, you don't get
11 the whole 9/11. You've got to exhaust this
12 other less generous plan first.

13 MR. SURI: Mr. Chief Justice, the
14 reason he is not getting the additional
15 benefits, again, is not that he served an
16 additional period of duty. It's that he already
17 went to college using some benefits that the
18 government has provided. That makes --

19 CHIEF JUSTICE ROBERTS: Yeah, but he
20 was fully entitled -- fully entitled to those
21 benefits because of his additional tour of duty.
22 Fine.

23 MR. SURI: Yes.

24 CHIEF JUSTICE ROBERTS: But, if you
25 take him and somebody else that didn't have an

1 additional tour of duty and that person has the
2 same length Post-9/11, the person who didn't
3 serve as long gets the full Post-9/11 benefits,
4 but the Petitioner does not, which -- and -- and
5 you say, well, but he's getting other benefits
6 under another program. Well, that's because he
7 earned those benefits under -- because of his
8 other service.

9 MR. SURI: But, Mr. Chief Justice,
10 everyone who is going to be using this election
11 provision in 3327 is going to be entitled to
12 both sets of benefits. And this follows from
13 the text of 3327(a)(1) and (a)(2). (a)(2)
14 states that in order to use this election
15 mechanism, you must meet the requirements for
16 entitlement to educational assistance under this
17 chapter, that is, under the Post-9/11 Bill.

18 CHIEF JUSTICE ROBERTS: So now, if I
19 understand that answer, it's that, look, you can
20 only go to college so -- so many years, and --
21 and we're paying for additional -- for -- for
22 years of college for the people who got
23 Montgomery benefits, and even though you get
24 additional benefits under Post-9/11, you know,
25 we're not going to pay for eight years of

1 college.

2 MR. SURI: Let me try a different way
3 of explaining why --

4 CHIEF JUSTICE ROBERTS: Well, but is
5 that -- is that a good, reasonable way of
6 looking at it?

7 MR. SURI: That is the consequence of
8 what Congress has wrote. And let me take a stab
9 at explaining why Congress might have designed
10 the statute this way.

11 The purpose or one purpose of the GI
12 Bill is to enable someone who has served in the
13 military to transition back into civilian life.
14 That's why the first GI Bill was called the
15 Servicemen's Readjustment Act. It was about
16 readjustment. And Congress could conclude that
17 in order to readjust, you need 36 months of
18 benefits. That's four years of college, nine
19 months per academic year.

20 And it could say that whether you get
21 these 36 months through one program or through
22 two programs is not of much concern to us
23 because these two programs are close substitutes
24 for each other.

25 JUSTICE JACKSON: But how do you --

1 CHIEF JUSTICE ROBERTS: And --

2 JUSTICE JACKSON: -- reconcile that
3 with the 48-month cap? I mean, there's --
4 there's something in the statute that Congress
5 has made clear that you get up to 48 months of
6 benefits. So how -- how -- how is that
7 consistent with your story about Congress having
8 a purpose to limit people to 36 months?

9 MR. SURI: In order to answer that
10 question, I'll need to explain how the overlap
11 between the Montgomery and Post-9/11 GI Bills
12 differs from the overlap between previous bills.

13 JUSTICE JACKSON: But are you saying
14 the 48 months doesn't apply? I mean, I thought
15 they -- Congress chose a cap, right? Consistent
16 with your story --

17 MR. SURI: Yes.

18 JUSTICE JACKSON: -- we have to let
19 this in somewhere. You can't, you know, have
20 every degree available on the government's dole.
21 So 48 months.

22 And I understand Mr. Rudisill to be
23 saying what I'd like to do is take my separate
24 periods of service and the benefits that I have
25 accrued and are entitled to as a result of those

1 and get 48 months' worth of benefits.

2 And I'm not sure it makes sense to say
3 the government is saying no, you can only have
4 36 because you used some of them before, which
5 sounds like what you're saying.

6 MR. SURI: What I'm saying is that he
7 can only use 36 because the limitation clause,
8 3327(d), specifically says that. Now I'm trying
9 to explain why it is that Congress might have
10 done it that way, but --

11 JUSTICE JACKSON: And your answer is
12 because they only wanted you to have 36 months,
13 but then I point to the 48. So that can't be
14 right. What's the other answer?

15 MR. SURI: The answer is Congress
16 treated this overlap between these two GI Bills
17 differently from the overlap between other GI
18 Bills. Other GI Bills apply to different wars.
19 You could serve in Vietnam and also serve in
20 Korea and that's how you'd get to 48 months.

21 That's not what happens under
22 Petitioner's view under this statute. Imagine a
23 veteran serves six continuous years in one war,
24 just the Iraq War. What Petitioner would allow
25 that person to do is say: I'm going to apply

1 the first three years of my Iraq War duty to the
2 Montgomery program, apply the second three years
3 to the -- to the Post-9/11 program, and get more
4 than 36 months of benefits, even though I've
5 served only in one war. And that's something
6 Congress has never previously allowed.

7 CHIEF JUSTICE ROBERTS: But you said
8 --

9 JUSTICE KAGAN: But, if I --

10 CHIEF JUSTICE ROBERTS: -- earlier
11 that the purpose of this is because you're
12 transitioning back to civilian life and this
13 will allow you to get the degrees that you may
14 have -- but, here, you have a situation where,
15 instead of transitioning after having served the
16 first time and transitioned, he doesn't get --
17 you're saying, well, you don't get another
18 transition because instead of just, you know,
19 whatever, you decided to go back to Iraq and
20 Afghanistan and get a Bronze Star, so we don't
21 have to worry about you transitioning to school.

22 MR. SURI: Mr. Chief Justice, this is
23 the consequence of the statute that Congress has
24 written. If that statute creates hardship in
25 particular cases, then Congress is free to amend

1 the statute as it has done many times before.

2 It is notable, however, that Congress
3 was aware of the way the VA had been applying
4 the statute in the 2011 amendments. The Senate
5 report accompanying that shows that. And it
6 chose not to change that interpretation.

7 JUSTICE KAGAN: If -- if -- if I
8 understand the way this statute works -- and
9 this goes to your explanation of why Congress
10 could have written it this way -- but if I
11 understand the way the statute works, suppose a
12 veteran has 35 months that he's already covered,
13 so he has one left. You're saying he has this
14 choice. He can take the -- the 36-month under
15 Montgomery and, if he does that, he gets a full
16 year extra under 9/11. Or he can swap out the
17 Montgomery for the 9/11 for the single month
18 left, and then he forfeits the additional year.

19 So why would that choice be put to the
20 veteran?

21 MR. SURI: I can explain why Congress
22 might have decided that those who have already
23 exhausted their Montgomery benefits should still
24 have the opportunity to get some additional
25 Post-9/11 benefits. There are a few different

1 reasons that might have explained it. We don't
2 know, in fact, why Congress did it.

3 The first possible reason is that
4 Congress was creating the Post-9/11 program and
5 making it retroactive. It knew that there would
6 be some veterans who had served after 9/11 but
7 before 2008, when the Post-9/11 bill was
8 enacted, and who had already used up all of
9 their Montgomery benefits. And Congress may
10 have wanted to ensure that those veterans get
11 something, and so the something it gave them was
12 to allow them to get 12 additional months after
13 exhaustion. That's one possibility.

14 A second possibility is this may be an
15 artifact of the fact that the Post-9/11 bill was
16 originally limited to college education and the
17 Montgomery bill was designed to focus on
18 vocational education. Congress may have decided
19 that if you've used your 36 months of Post-9/11
20 benefits to go to college, you don't need
21 additional benefits under the program that's
22 geared toward vocational training. But, if you
23 used your 36 months of benefits under the
24 vocational program, then you might still want to
25 go to college for a few years and, therefore,

1 we'll leave open the option of getting the
2 Post-9/11 college-related benefits.

3 A third possibility is that Congress
4 said: We're going to be extremely generous for
5 those who want 36 months of benefits, you'll
6 have this extremely helpful Post-9/11 program,
7 but for those who want more than 36 months,
8 we'll make a tradeoff. You can use the less
9 expensive program for most of the time when
10 you're going to college and then you use the
11 more expensive Post-9/11 program when you're
12 going to graduate school. This is a perfectly
13 reasonable trade for Congress to make if it's
14 trying to limit the overall cost of the program.

15 JUSTICE SOTOMAYOR: I -- the only
16 problem with that answer, it doesn't really
17 answer Justice Kagan's question. Her
18 hypothetical suggested, I think, that it's
19 irrational to think that Congress would say, if
20 you wait and take the one month, you'll get 12,
21 but if you decide to take the one -- not take
22 the one month and switch over immediately, that
23 you're going to lose those 12 months. That's
24 what's basically, I think, the irrationality.

25 Am I assuming --

1 JUSTICE KAGAN: It just seems utterly
2 arbitrary.

3 MR. SURI: I -- I -- I'll add two
4 points in response to that. One poss- -- one
5 further possibility is that that is an
6 unintended consequence of how these coordination
7 provisions were written. Coordination of
8 benefits is a very complicated enterprise, and
9 it may be that this is just an unintended
10 consequence of what Congress wrote.

11 A final possibility is that we're
12 wrong about the exhaustion rule. It may be that
13 once you've exhausted the Montgomery benefits,
14 you don't get additional Post-9/11 benefits.
15 But that's not the question before the Court
16 today. The only question that's presented here
17 is how many months of benefits Mr. Rudisill is
18 entitled to.

19 JUSTICE SOTOMAYOR: That -- that seems
20 odd, doesn't it, that Congress is going to
21 penalize a veteran who, as the other side
22 pointed out, has served the country for a longer
23 period of time, put himself at risk in not one
24 war but two wars, and now we're going to deprive
25 him of access -- of any access to the more

1 fulsome benefits.

2 MR. SURI: Justice Sotomayor, no one
3 is being made worse off. Before Mr. Rudisill
4 went into his third period of service in 2007,
5 he had no expectation of receiving Post-9/11
6 benefits because that program didn't exist yet.

7 JUSTICE SOTOMAYOR: No, but one --
8 the -- the very purpose of the 9/11 program was
9 to ensure that he did serve. He could have
10 retired, but he chose to stay. And there should
11 be a benefit, which is what Congress made
12 available to him.

13 MR. SURI: It -- it -- it -- it is not
14 the statutory scheme that the more periods of
15 service you have, the more benefits you obtain.
16 Someone could serve three years, five years, or
17 10 years and still get only 36 months of
18 Montgomery benefits. Only --

19 JUSTICE SOTOMAYOR: All right. Can I
20 move on from that answer for a second?
21 3327(h)(1).

22 MR. SURI: Yes.

23 JUSTICE SOTOMAYOR: It's an amendment
24 that's happened more recently. Is that
25 amendment intended to take care of the

1 hypothetical that Justice Kagan and I are saying
2 is a bit irrational or suggesting might be
3 irrational?

4 MR. SURI: No, that takes care of a
5 different problem.

6 JUSTICE SOTOMAYOR: Okay.

7 MR. SURI: And --

8 JUSTICE SOTOMAYOR: Go ahead.

9 MR. SURI: And it is a crucial piece
10 of context in interpreting 3327 because, on
11 Petitioner's view, 3327 becomes potentially
12 rather superfluous.

13 3322(h) states that you can't use the
14 same period of service to establish entitlement
15 to two different programs. You've got to credit
16 it to one program or the other.

17 But 3327 says that in order to make an
18 election, you must be entitled to both
19 Montgomery benefits and Post-9/11 benefits. So
20 you have to have eligibility for both programs.
21 And this provision, (h), is telling you, you
22 can't be eligible for both programs based on a
23 single period of service.

24 If you put those two things together,
25 on Petitioner's view, 3327 does no work at all.

1 It doesn't apply to people with multiple periods
2 of service because that's his theory. And it
3 doesn't apply to people with a single period of
4 service because (h) says you can't be eligible
5 for both programs based on a single --

6 JUSTICE SOTOMAYOR: So what --

7 MR. SURI: -- period of service.

8 JUSTICE SOTOMAYOR: -- what does (h)
9 mean? What can the Secretary waive? Which
10 election?

11 MR. SURI: I -- I'm sorry, I -- I
12 thought you were referring to 3322(h).

13 JUSTICE SOTOMAYOR: No.

14 MR. SURI: But you're referring --

15 JUSTICE SOTOMAYOR: I said 3327(h)(1).

16 MR. SURI: 3327(h) states that if a
17 veteran makes a choice that the Secretary
18 determines is not in his best interests, the
19 Secretary --

20 JUSTICE SOTOMAYOR: When would that
21 occur?

22 MR. SURI: That would occur as soon as
23 the Secretary receives the election. I will
24 note that provision does not apply to this case
25 because it refers to elections made from 2017

1 onward. And this particular election was made
2 before 2017.

3 JUSTICE JACKSON: What is your
4 response to your counterpart's contention that
5 the work of 3327 is to effect the swap and that
6 insofar as Mr. Rudisill is not seeking to swap,
7 it doesn't apply to him?

8 MR. SURI: I appreciate the chance to
9 answer that question. I -- I'd give a few
10 answers to that.

11 The first is the text of 3327(a),
12 again, page 4A of our brief, says an individual
13 may elect to receive. It's talking about
14 receiving benefits, not converting benefits or
15 swapping benefits.

16 The second point is a structural one.

17 JUSTICE JACKSON: No, go on to (d).
18 Right, (d), "subject to paragraph 2 and except
19 as provided in (e), an individual making an
20 election under (a)," which is what you just
21 referenced, right, "shall be entitled to
22 benefits under this chapter instead of." So is
23 that not doing the work of saying the reason why
24 you're in 3327 at all is because, if you're an
25 (a) person who has made an election, you are

1 seeking to convert?

2 MR. SURI: I -- I appreciate the force
3 of the point with respect to (d) if you look at
4 that provision alone, but if you go back up to
5 (a), it says that in order to make an election,
6 you have to both be entitled to Montgomery
7 benefits, that's (a)(1), and be entitled to
8 Post-9/11 benefits.

9 JUSTICE GORSUCH: Yeah, I --

10 MR. SURI: That's (a)(2).

11 JUSTICE GORSUCH: -- I -- I take that
12 point. But just to follow up on my colleague's
13 observation, (d) tells us what the effect of an
14 election under (a) is, right?

15 MR. SURI: Yes.

16 JUSTICE GORSUCH: And that is swapping
17 one benefit for the other, right, "instead of"?

18 MR. SURI: (d) says that you will be
19 eligible for the one and you will no longer be
20 eligible for the other. I entirely agree with
21 that.

22 JUSTICE GORSUCH: You swap one for the
23 other, right?

24 MR. SURI: But --

25 JUSTICE GORSUCH: Right?

1 MR. SURI: Yes, I accept that.

2 JUSTICE GORSUCH: And that's the point
3 of -- of -- that's the effect of an election
4 under (a)?

5 MR. SURI: Yes. But we must also look
6 at who can make an election under (a) in the
7 first place, and you have to be entitled to
8 Post-9/11 benefits.

9 JUSTICE GORSUCH: All right. I -- I
10 take that point.

11 JUSTICE JACKSON: And you're entitled
12 if you serve in the relevant period. I mean,
13 this is where the overlap is coming that I think
14 he's identifying. This is a person who has one
15 period of service, but that period of service is
16 happening at a time in which only Montgomery
17 benefits are available to him because Post-9/11
18 has not yet been in effect, but he's earning
19 Post-9/11 because he's serving after 9/11.

20 And the question is, will he be
21 relegated to just having Montgomery because that
22 was all that was available to him during his
23 period of service, or is there some mechanism
24 that allows him to get the Post-9/11 benefits
25 that he's entitled to because of his period of

1 service? And I read 3327 as doing that.

2 MR. SURI: Exactly right. 3327 is the
3 mechanism for someone who is entitled to both
4 programs to start receiving Post-9/11 benefits.

5 JUSTICE JACKSON: Yeah, but not
6 because of separate periods of service. Mr.
7 Rudisill says, I'm not entitled in the same way.
8 I'm entitled to these separately because I have
9 two periods of service, not the one that is
10 falling in the overlap. I have two, he says.

11 MR. SURI: And -- and my response to
12 that is there's no statutory text whatsoever
13 that draws a distinction between one period of
14 service and two in 3327 or in 3322(d), the
15 provision that points to 3327.

16 JUSTICE JACKSON: (a), you pointed to
17 two periods of service in 3322(a).

18 MR. SURI: 3322(a) doesn't say
19 anything about periods of service either. And
20 it's notable that Petitioner says that many
21 provisions in this statute that have -- that say
22 nothing about periods of service apply to him.
23 For example, 3322(a) says you can't use two
24 different programs concurrently. He says that
25 applies to him. He doesn't say that doesn't

1 apply to people with multiple periods of
2 service.

3 So he seems to be reading in a
4 multiple-period-of-service limitation to 3327
5 but not to these other provisions, and he
6 doesn't explain the justification for that,
7 other than, potentially, it would be a fairer or
8 more sensible scheme. And he may be right about
9 that, but this is not the forum for that debate.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 JUSTICE ALITO: Do you know how many
15 veterans are affected by this question?

16 MR. SURI: The -- we don't know
17 exactly. The best estimate that we have is that
18 it could be up to 30,000 veterans who
19 potentially would be affected, that is,
20 individuals who fall into the same multiple
21 periods of service and have already used some
22 Montgomery benefits category.

23 That doesn't mean, however, that all
24 of them have plans to go to graduate school or
25 all of them would use the benefits that would be

1 available.

2 JUSTICE ALITO: When a veteran enrolls
3 in a college program and fills out the form to
4 get benefits from the VA, if that veteran asks
5 for Montgomery benefits, does that constitute an
6 election not to receive the 9/11 benefits?

7 MR. SURI: That constitutes an
8 election to receive Montgomery rather than
9 Post-9/11 benefits. But, to respond to a
10 question that you posed to Mr. Tseytlin earlier
11 if I may, that election is not irrevocable. The
12 only election that's irrevocable is the election
13 of Post-9/11 benefits, and that follows from the
14 text of 3327(i).

15 JUSTICE ALITO: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: A follow-on to
19 that last question. I -- the way I understand
20 your reading of the statute, someone who
21 qualifies for Montgomery and Post-9/11 benefits
22 under separate periods of service could not use
23 their 36 months of Post-9/11 benefits first and
24 then get 12 of Montgomery?

25 MR. SURI: That is prevented by a

1 different provision that we haven't talked about
2 yet, which is 3327(d)(1), which states that once
3 you've elected Post-9/11 benefits, you're no
4 longer eligible for the Montgomery benefits.

5 JUSTICE SOTOMAYOR: That one I'll have
6 to look at. Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Gorsuch?
9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: I just want to
11 make sure of one thing first, that you said you
12 can't receive Post-9/11 benefits unless you
13 elect to receive them?

14 MR. SURI: For an individual who's
15 covered by multiple programs, that's correct,
16 Justice Kavanaugh.

17 JUSTICE KAVANAUGH: Okay. So there
18 has to be an election. And your point is the
19 only way to make an election is under 3327?

20 MR. SURI: That's correct.

21 JUSTICE KAVANAUGH: Okay. Second, I
22 think you had been asked about the other side's
23 point that 3327 is best read as a swap or
24 trade-in provision, and you said you appreciated
25 the opportunity to answer the question, but I

1 don't think you were able to get the answer. So
2 I'm giving you a full opportunity to answer that
3 question.

4 MR. SURI: Thank you, Justice
5 Kavanaugh. The first answer is the textual
6 point, which is 3327(a) says an individual may
7 elect to receive educational assistance under
8 this chapter. That echoes the language of
9 3322(a), which says "shall elect" under which
10 chapter to receive educational assistance.

11 That's a clue that this provision is
12 one of the options that is on the table under
13 3322(a). 3322(a) is saying you must pick either
14 Chapter 30, Montgomery, or Chapter 33,
15 Post-9/11. And this provision is saying here's
16 how you pick Post-9/11. That's one answer.

17 The second answer is the structure of
18 3327(a). It applies only to individuals who are
19 eligible for both programs, so that precludes
20 the idea that it's meant to allow someone who is
21 eligible for one program to trade in benefits in
22 order to obtain the other program. You have to
23 already have Post-9/11 benefits in order to make
24 this election in the first place. And that's in
25 the text of 3327(a)(2).

1 The third answer is going back to
2 3322(d), a provision that was discussed earlier
3 during Mr. Tseytlin's argument. It states that
4 the -- it -- it tells us what 3327 is designed
5 to do. It states that an individual must
6 coordinate entitlement under 3327. It doesn't
7 say that an individual can convert entitlement
8 under 3327.

9 It's notable that in Mr. Tseytlin's
10 brief, he resorts to phrases such as the veteran
11 has no need to "coordinate" Montgomery benefits
12 into Post-9/11 benefits. That's not a normal
13 usage of the word "coordinate." You coordinate
14 one program with another program. You don't
15 coordinate or convert one program into another
16 program.

17 So those are the textual reasons that
18 -- the most important textual reasons that 3327
19 can't be about swapping.

20 JUSTICE KAVANAUGH: How much
21 significance, if any, is there that it says
22 "coordination of entitlement" and not
23 "coordination of benefits"?

24 MR. SURI: That is a very significant
25 point, Justice Kavanaugh, because that too

1 suggests that this provision is meant to address
2 specifically veterans who are entitled to both
3 programs. Congress thought about veterans who
4 have multiple types of entitlement, and it wrote
5 this provision saying: Go look at 3327 to
6 determine how to coordinate those programs.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: No.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So just on that very
14 last point, you've repeatedly emphasized that
15 this is about veterans who already have
16 entitlements to both programs, right?

17 What I don't see in 32 -- 3327(a)(2)
18 is language that supports that. If you look at
19 that actual provision, it says -- it's talking
20 about an individual who may elect to receive if
21 they are, as of August 1st, under these certain
22 categories. That's (a)(1).

23 MR. SURI: Yes.

24 JUSTICE JACKSON: And then, as of the
25 date of the individual's election, meets the

1 requirements for entitlement to educational
2 assistance under this chapter.

3 MR. SURI: Yes.

4 JUSTICE JACKSON: That -- so the
5 language there is not "is entitled" or "already
6 has been entitled." It seems to be suggesting
7 that if you're one of these people who meets the
8 entitlement, then you can go on, as Justice
9 Gorsuch points out, to (d), which tells us what
10 happens, that you can exchange -- I mean, do you
11 -- do you dispute that (d) has sort of an
12 exchange quality to it?

13 MR. SURI: I don't dispute that.

14 JUSTICE JACKSON: So what's it doing
15 if -- if not the swap?

16 MR. SURI: I'll say a couple of points
17 in response to that. The first is the only way
18 to be entitled to Post-9/11 benefits is to meet
19 the requirements for entitlement.

20 JUSTICE JACKSON: No, I appreciate,
21 but Congress doesn't use superfluous words.
22 When we interpret a statute, if it says "meets
23 the requirements," it's doing something
24 different, presumably, than you are entitled,
25 which is the way you're reading it.

1 MR. SURI: I think that's giving the
2 drafters of this statute a little too much
3 credit, Justice Jackson.

4 JUSTICE JACKSON: All right. So what
5 is (d) doing if not the swap?

6 MR. SURI: (d) is providing two
7 things. (d)(1) is stating that you cease to be
8 entitled to one form of benefit and you -- you
9 can start using the other form of benefit.

10 JUSTICE JACKSON: But why? I thought
11 you said they were entitled to both. And what
12 -- why would a person do this? Or maybe the --

13 MR. SURI: Because Congress said this
14 is the provision that must be used to
15 coordinate.

16 JUSTICE JACKSON: I see. All right.

17 MR. SURI: And -- and one last point
18 if I may, Justice Jackson. It's notable that
19 3327(a)(1) also refers to individuals who don't
20 have any Montgomery benefits in the first place.
21 So this is in 3327(a)(1)(F), is a member of the
22 armed forces who is not entitled to Montgomery
23 benefits. So --

24 JUSTICE JACKSON: Right. Because a
25 lot of people were -- were shuttled to this,

1 right, from 3322(d)? There were lots of people,
2 not only the Montgomery benefit people, but
3 others get there.

4 MR. SURI: I -- I think that defeats
5 the conversion idea. These people have no
6 benefits to convert, and yet they're covered by
7 3327.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Mr. Tseytlin?

12 REBUTTAL ARGUMENT OF MISHA TSEYTLIN

13 ON BEHALF OF THE PETITIONER

14 MR. TSEYTLIN: Thank you, Your Honor.

15 My friend started with 3322(a). I
16 think it's pretty remarkable that they appear to
17 be basing their argument based on this provision
18 that the election in 3322(a) is a mandatory
19 election, which is clearly in service of the
20 concurrent usage bar, is doing completely
21 different work than 3327. It is identical to
22 the -- to the election mechanism in 33 -- in --
23 in 3033(a), and my friend doesn't say that that
24 somehow shuttles somebody into 3327.

25 In fact, the -- that provision

1 strongly supports our position in two respects.
2 One is the suggested difference between "may"
3 and "shall"; and second is that their
4 interpretation renders 3327 -- 3322(a)'s use of
5 a mandatory bar on concurrent usage superfluous
6 because, under their reading of -- under -- of
7 3327, a veteran who's entitled to Montgomery and
8 Post-9/11 either has to use up all their
9 Montgomery benefits to get to Post-9/11 or give
10 up their Montgomery benefits to use Post-9/11.
11 Either way, concurrent usage would be
12 impossible, which means that this entire
13 provision would be superfluous.

14 Second, 30 -- 3327 is plainly a
15 swapping mechanism, and every provision, every
16 subsection of 3327 points in that direction.

17 We talk about (a). That's the
18 voluntary election mechanism. My -- I heard my
19 friend mention (a)(1)(F). That provision serves
20 absolutely no function under his exhaustion view
21 because that person has no Montgomery benefits
22 to exhaust.

23 With regard to (b), that -- that lets
24 you stop paying. With regard to (c), that lets
25 you revoke the transfer of Montgomery benefits

1 because now they're so much more beneficial
2 because you can trade them for Post-9/11
3 benefits. (d) is plain as day a swap. (f) lets
4 you get your Montgomery payments back pro rata.

5 Every single indication is that
6 Congress was creating a swap mechanism, not an
7 exclusive mechanism to invoke your 3311
8 entitlement, unless you've exhausted your --
9 your Montgomery benefits.

10 Three, the number of veterans
11 impacted, my -- my friend says 30,000. That's
12 just plain wrong. It's north of a million, and
13 that's because their interpretation doesn't just
14 cover those that are on 3327(d)(2), it also
15 covers those that would be spit into 37 -- 37 --
16 to 3327(d)(1), which is how you get over -- over
17 a million.

18 You -- you heard my friend attempt to
19 do back flips to try to get around how the
20 exhaustion requirement makes any sense
21 whatsoever, an unprecedented exhaustion
22 requirement. And then, when he kind of hit a
23 brick wall, he said, well, maybe the exhaustion
24 requirement doesn't -- doesn't have to exist.

25 Well, that just would put the VA into

1 even more absurd land, where veterans who served
2 before 9/11 used up all of their benefits,
3 Montgomery benefits before 9/11, then felt the
4 call after the September 11th attacks, would be
5 entitled to no Post-9/11 benefits whatsoever?
6 That's even more absurd than the absurd
7 exhaustion concept.

8 And then I will close on the
9 following. All of these kind of back flips and
10 whatnot are entirely unnecessary. The statute
11 should be read as what it says: 3311 gives you
12 a plain-as-day entitlement. 3327 is a voluntary
13 swap mechanism, does not limit that entitlement
14 in any way.

15 Read in that way, the statute has no
16 superfluity, has no problems in it, and it
17 plainly achieves the pro-veteran purposes for
18 which Congress enacted the Post-9/11 GI Bill.

19 Thank you, Your Honors.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 11:14 a.m., the case
24 was submitted.)

25

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